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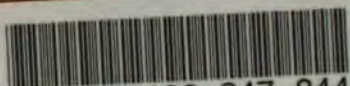
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CASES ARGUED AND DETERMINED

^{Massachusetts} IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

OCTOBER 1912—FEBRUARY 1913

HENRY WALTON SWIFT

REPORTER

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OF THE
SUPREME JUDICIAL COURT

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ATTORNEY GENERAL

HON. JAMES MARCUS SWIFT.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

JOHN C. BARNES vs. MAYOR OF CHICOPEE & another.

Hampden. September 24, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

*Civil Service. Police. Municipal Corporations. Constitutional Law. Statute,
Construction. Police, District and Municipal Courts. Judgment.*

St. 1911, c. 468, which extends the provisions of the civil service law to chiefs of police and city marshals of certain cities and towns, is constitutional.

The principal provisions of R. L. c. 19, known as the civil service act, are constitutional, without regard to the validity of the provisions relating to veterans' preference, which are distinct and severable from the rest of the statute.

In St. 1911, c. 468, which provides for the extension of the civil service law to the chief of police or city marshal in certain cities and towns, the provision of § 3, that the act shall be submitted to the voters of the cities or towns to which it is applicable and shall take effect in any such city or town only upon its acceptance by a majority of the voters voting thereon, is constitutional.

The acceptance by a city of St. 1911, c. 468, providing for the extension of the civil service law to the chief of police or city marshal of certain cities and towns, makes applicable to the city marshal of the accepting city the provision of St. 1906, c. 210, St. 1907, c. 272, that "Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior."

The provision of St. 1906, c. 210, St. 1907, c. 272, that "Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior," is not restricted in its application to police officers who were appointed in accordance with the civil service rules, but applies

to every person holding such an office at the time it became classified, however he was appointed.

On a petition for a writ of mandamus ordering the reinstatement of the petitioner as city marshal of a city that had accepted St. 1911, c. 468, after St. 1911, c. 624, had taken effect, it appeared that the petitioner had been removed by the mayor of the city after a hearing, and that within ten days thereafter he had brought a petition under St. 1911, c. 624, in the police court having jurisdiction, upon which it was found by that court that the order of the mayor removing the petitioner was made without proper cause, such order was reversed and an order was made that the petitioner be reinstated. St. 1911, c. 624, provides that such a decision of the police court "shall be final and conclusive upon the parties." *Held*, that on the petition for a writ of mandamus the correctness of the decision of the police court was not open to review.

PETITION, filed on June 3, 1912, for a writ of mandamus commanding the respondent Rivers, as the mayor of Chicopee, to reinstate the petitioner as city marshal in place of the respondent Walsh.

The case was heard by *Hammond*, J., who ruled that a writ of mandamus should issue, and at the request of the respondent Rivers reported the case for determination by the full court.

St. 1911, c. 468, of which the title is stated in the opinion, is as follows:

"Section 1. The provisions of chapter nineteen of the Revised Laws, entitled 'Of the Civil Service', and all acts in amendment thereof and in addition thereto, and the civil service rules made thereunder, and all acts now or hereafter in force relating to the appointment and removal of police officers, shall apply to the superintendent, chief of police or city marshal in all cities except Boston, and in all towns that have accepted, or may hereafter accept, the provisions of said chapter nineteen.

"Section 2. All acts and parts of acts inconsistent herewith are hereby repealed.

"Section 3. In cities to which it is applicable this act shall be submitted to the voters at the next annual state election; in towns to which it is applicable it shall be submitted to the voters at an annual town meeting; and in either case it shall take effect in any such city or town upon its acceptance by a majority of the voters voting thereon; otherwise it shall not take effect in any such city or town."

St. 1911, c. 624, of which the title is stated in the opinion, is as follows:

"Section 1. Every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, except members of the police department of the city of Boston, of the police department of the metropolitan park commission, and except members of the district police, whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may, after a public hearing, as provided for by section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, as amended by chapter two hundred and forty-three of the acts of the year nineteen hundred and five, and within ten days after such hearing, bring a petition in the police, district or municipal court within the judicial district where such person resides, addressed to the justice of the court and praying that the action of the officer or board in removing, suspending, lowering or transferring him may be reviewed by the court, and after such notice to such officer or board as the court may think necessary, it shall review the action of said officer or board, and hear the witnesses, and shall affirm said order unless it shall appear that said order was made by said officer or board without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated in his office. The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties.

"Section 2. This act shall take effect upon its passage."

R. J. Talbot, (*T. A. McDonnell* with him,) for the respondent Rivers.

J. P. Kirby, (*E. A. McClintock* with him,) for the petitioner.

RUGG, C. J. This is a petition for a writ of mandamus to reinstate the petitioner in the office of city marshal of the city of Chicopee. The petitioner was appointed to that office in January, 1911, and served until February 15, 1912, when after a hearing he was removed by the respondent Rivers, who was mayor of the city of Chicopee. The petitioner within ten days thereafter brought a petition in the Police Court of Chicopee praying that the action of the mayor be reviewed, upon which it was found that the order of the mayor removing the petitioner was without proper cause, and it was reversed and the petitioner ordered reinstated. The

respondent Rivers refused to recognize this order of the court. The petitioner rests upon St. 1911, c. 468, entitled "An Act to extend the provisions of the civil service act to chiefs of police of certain cities and towns," and St. 1911, c. 624, entitled "An Act relative to removals, suspensions and transfers in the civil service." The constitutionality of these acts is attacked and their meaning is involved.

1. The constitutionality of these acts cannot be doubted. The office of city marshal of a city has been regarded in a large number of instances and for many years as appointive, and not elective. The Constitution does not establish it as an elective office, and does not fix its tenure. It is an office described by various names and created by law with differing provisions as to appointment, removal and length of term dependent upon divers statutes enacted for, or upon ordinances and by-laws adopted by the several cities and towns. It is within the power of the Legislature to lengthen or shorten the tenure of such an office or to place its incumbents under operation of the civil service law. *Taft v. Adams*, 3 Gray, 126. *Opinion of the Justices*, 165 Mass. 599, 601. *Graham v. Roberts*, 200 Mass. 152, 157. The general principle of the civil service law was approved as constitutional in *Opinion of the Justices*, 138 Mass. 601. Its provisions have been enforced in many cases without question. See, for example, *Ransom v. Boston*, 192 Mass. 299; *Garvey v. Lowell*, 199 Mass. 47; *McCarthy v. Emerson*, 202 Mass. 352, and cases cited elsewhere in this opinion. It is not necessary to consider whether there is any merit in the contention directed against the veteran preference provisions of the civil service act, as these are distinct and severable from the rest of the statute, and no question respecting them is involved here. *Goldstein v. Connor*, 212 Mass. 57. See *Brown v. Russell*, 166 Mass. 14; *Opinion of the Justices*, 166 Mass. 589.

2. Whether the tenure of office of a city marshal of a particular city shall be during good behavior or from year to year is a matter of local concern, and not of universal interest. The provision that St. 1911, c. 468, should take effect in cities and towns only upon acceptance by the voters is constitutional and in accordance with long continued practice. *Graham v. Roberts*, 200 Mass. 152, 157, and cases there cited. *Prince v. Crocker*, 166 Mass. 347, 360. Therefore, the statute became operative in the city of Chicopee

upon its acceptance at the annual State election of 1911. Section 1 made applicable "to the superintendent, chief of police or city marshal in all cities except Boston" the provisions of R. L. c. 19 and all acts in amendment thereof and in addition thereto (which relate to the civil service) and all rules made under the authority of such statutes. The statute in force in 1911 respecting tenure of office was St. 1906, c. 210, as amended by St. 1907, c. 272, section 1 of which provides that "Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior."

3. The effect of these statutes was to make the tenure of the heads of police departments thereby affected one during good behavior and to change the pre-existing term. The acceptance of St. 1911, c. 468, at the annual election by the voters of any city was the equivalent of a legislative determination that the offices therein described became classified under the civil service rules of the Commonwealth within the meaning of those words as used in St. 1906, c. 210, St. 1907, c. 272. It was plainly within the power of the Legislature thus to add offices to the classified list. The respondent has argued ingeniously that the language of the statute to the effect that every city marshal "now holding . . . an office classified under the civil service rules" means holding under an appointment received in accordance with civil service rules. But the fair meaning of the words used is that the person holding the office at the time it becomes classified, however appointed, continues to hold the office under the new tenure. This being the significance of the statute, it is of no consequence that the petitioner was appointed to the office before it was added to the classified list, and hence without complying with the requirements of the civil service law. The test fixed by the statute is the holding of the office, and not the method of appointment. *Lattime v. Hunt*, 196 Mass. 261. *Logan v. Mayor & Aldermen of Lawrence*, 201 Mass. 506.

4. St. 1911, c. 624, took effect upon its passage on July 3, 1911. It was a part of the law of the Commonwealth when St. 1911, c. 468, took effect by acceptance by the voters of Chicopee. The decision of the Police Court of Chicopee by the terms of § 1 of

c. 624, "shall be final and conclusive upon the parties." The correctness of the conclusion of that court is not open to review in a proceeding of this sort. *Dow v. Casey*, 194 Mass. 48.

Writ to issue.



WILLIAM C. SMITH *vs.* FRANK H. KENNEY.

Franklin. September 24, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Equity Pleading and Practice, Master's report. *Deed*, Validity. *Undue Influence*.

A judge who hears a suit in equity upon a master's report has a right to draw inferences warranted by the facts reported by the master, although such inferences are contrary to an inference reported as a finding by the master.

In a suit in equity, brought in behalf of an aged man by the conservator of his property, to set aside a conveyance of real estate made by the plaintiff through a third person to his wife who conveyed such real estate to her nephew the defendant, the case was referred to a master who filed a report to which no exception was taken. The master found facts from which it could be inferred that in signing the deed in question the plaintiff's weak will was so dominated by his wife and by the defendant that the execution of the deed was in reality their act and not his. In regard to the plaintiff's wife and the defendant the master made the following statement: "I do not find that undue influence was exercised by them or either of them, unless under all of the circumstances surrounding the making of the conveyances . . . the court finds the procedure was an exercise of undue influence as a matter of law." The trial judge, who heard the case on the master's report, made a decree confirming the report and ordered the defendant to convey the property to the plaintiff. *Held*, that the question of undue influence was one of fact, on which the master appeared to have made no decision, or, if his language could be construed as a finding that the defendant did not exercise undue influence upon the plaintiff, such a finding was made only by an inference from the facts set out in his report, and that the trial judge had the right to draw such different inferences from the facts reported by the master as those facts reasonably warranted, so that this court could not say that the judge was wrong in reaching the conclusion on which he based his decree.

DECOURCY, J. This bill in equity is brought in behalf of the plaintiff by his conservator, to set aside a conveyance of real estate made by the plaintiff through a third person to his wife who conveyed such real estate to the defendant. The action was

referred to a master * and subsequently was heard by a judge of the Superior Court,† who made a decree confirming the master's report and ordering the defendant to convey the property to the plaintiff. The case is before us on the defendant's appeal from this decree.

No exception was taken to the master's report, and it establishes the following facts. William C. Smith, in 1908, was in his eighty-eighth year, and until within a few years had successfully performed all the work of his farm, which contained thirty-five acres aside from a wood lot. Within recent years the impairment of his physical powers prevented him from obtaining from his farm sufficient produce for the support of his household, which comprised himself and Sophia C. Smith, a second wife whom he married when in his seventy-first year; and his adopted son, resident in Hawaii, had furnished toward that support about \$150 annually for the past four or five years.

The defendant Frank H. Kenney was a nephew of Mrs. Smith. At her urgent solicitation he was engaged, in April, 1908, to conduct the farm. He received the use of a cottage on the farm for himself and his daughter, and whatever farm produce and groceries they needed, but no specific agreement was made as to compensation for his services. For two years he was working foreman, and with Mrs. Smith assumed the management of the farm and the disposal of its products. "They consulted Mr. Smith occasionally, but he was not a considerable factor in matters pertaining to the management of the farm."

In the spring of 1910, the defendant went to a distant town to consult a lawyer concerning the collection of money for his services, and on April 13, this attorney appeared at the plaintiff's house, bringing with him some blank forms of deeds. Here he had a conference with Mrs. Smith and the defendant, after which Mr. Smith was summoned into the room. The lawyer demanded an immediate settlement for the services of Kenney, and threatened a law suit. Among other things the defendant stated that if the plaintiff would satisfy "Aunt Sophia" in the matter of the conveyance of real estate to her he would be satisfied and would press his claim no further. Before the parties separated the plaintiff

* Clifton L. Field, Esquire.

† Fessenden, J.

William C. Smith had conveyed by warranty deed his residence, barns and the larger part of his farm, worth from six to seven thousand dollars, reserving only a life interest therein, to one Phelps, a half-brother of the defendant; and on the same day Phelps conveyed his interest to Mrs. Smith. On October 3, 1910, Mrs. Smith conveyed the premises to the defendant, reserving a life estate. No money consideration passed for any of these deeds. With reference to the transactions of April 13, the master reports: "I find that while the complainant was not of unsound mind, yet he was not of sufficiently strong mental capacity to appreciate and understand the provisions of a deed, and that he did not understand them in this instance but thought that he was conveying to his wife a half interest in his farm instead of what he actually did convey; that counsel then present was employed by Mr. Kenney; that no one present had any concern for Mr. Smith's interests, and that he was not informed of nor did he appreciate his situation in this regard; that both the respondent and Mrs. Smith regarded the complainant incapable of doing business, and acted upon this hypothesis in the management of the farm." When we add to these facts the description of William C. Smith as he formerly was, a man "industrious and thrifty, promptly meeting every financial obligation . . . a man of strong notions of individual rights and duties," it is apparent that at the time of the conveyance by him he was mentally and physically the wreck of a strong character and an easy victim of coercion and fraud.

It is not clear what the master intended by the following paragraph in his report: ". . . while there was a good understanding between the respondent and Sophia C. Smith, and while the latter desired and expected to bestow her property including any interest she had in her husband's real estate upon the respondent, I do not find that undue influence was exercised by them or either of them, unless under all of the circumstances surrounding the making of the conveyances of April 13, A. D. 1910, the court finds the procedure was an exercise of undue influence as a matter of law." The existence of undue influence is a question of fact, *Bassity v. Welch*, 212 Mass. 338, and the master apparently does not come to any decision thereon. If his language is to be construed as a finding that the defendant did not exercise undue influence upon the plaintiff, evidently it is only by way of infer-

ence from the facts set out in the report, and not an independent finding on other evidence. The trial judge had the right to draw such further or different inferences from the facts reported by the master, as those facts reasonably warranted. He well may have inferred that in signing the deed the plaintiff's weak will was so dominated by the defendant and by Mrs. Smith, whose relation imposed upon her the duty of protecting his interests, that the execution of the deed was in reality their act and not his. And in reaching the conclusion upon which he based the decree from the facts reported and the inferences he made therefrom, we cannot say that he was wrong. *French v. Hall*, 198 Mass. 147. *Rosenberg v. Schraer*, 200 Mass. 218. *Hawkes v. Lackey*, 207 Mass. 424.

Decree affirmed with costs.

The case was submitted on briefs.

A. D. Flower, W. H. Brooks & W. Hamilton, for the defendant.
F. J. Lawler, for the plaintiff.



EMMA L. NOYES vs. BOSTON and MAINE RAILROAD.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Evidence, Remoteness, Res inter alios.

At the trial of an action under St. 1906, c. 463, Part II, § 247, for damages resulting from the destruction of a barn of the plaintiff in August of a certain year by fire alleged to have been communicated by a locomotive engine of the defendant, the evidence of the plaintiff was circumstantial and was controverted by evidence of the defendant, and the defendant, in order to show that the fire was set by a son of the plaintiff, offered to prove that at the time of the fire the plaintiff's son was at home, that when a young boy he had had a strong inclination to set fires and had set several, that in the autumn following the burning of the plaintiff's barn several fires occurred within a mile of the plaintiff's barn and that the plaintiff's son at the time such fires were discovered was very near to them, that subsequently he was arrested by a constable to whom he admitted that he had set several of the fires that occurred in the autumn, and that a district court after an examination of him by two physicians ordered his committal to a hospital on the ground that he had a mania for setting fires. The evidence was excluded.

Held, that the evidence properly was excluded as too remote and as presenting collateral issues; and *also* that the order of the district court was inadmissible as involving the record of judicial proceedings to which the plaintiff was not a party.

TORT under St. 1906, c. 463, Part II, § 247, for damages resulting from the burning on August 12, 1908, of a barn of the plaintiff in West Boylston alleged to have been caused by fire communicated by a locomotive engine of the defendant. Writ dated November 20, 1909.

In the Superior Court the case was tried before *Irwin, J.* The plaintiff introduced evidence, which in its nature was circumstantial and which was controverted by evidence of the defendant, tending to show that the fire was caused by sparks from a locomotive engine of the defendant.

It appeared that a son of the plaintiff was at home on the day of the fire, and the defendant offered to show that the son was there at the time of the fire; that when he was a young boy he had had a strong inclination to set fires, and had set several; that in the autumn of 1908 several fires occurred within a radius of a mile from the plaintiff's barn and that the plaintiff's son was very near the place where such fires took place at the time when they were discovered; that he was arrested by a constable, and that he admitted to the constable that he set several of these fires; that the district court of Clinton ordered an examination of the plaintiff's son by two physicians, who committed him to a hospital on the ground that he had a mania for setting fires. The defendant did not contend that the alleged admission to the constable in any way referred to the fire mentioned in the declaration.

The evidence was excluded subject to an exception by the defendant.

The jury found for the plaintiff in the sum of \$2,436.23; and the defendant alleged exceptions.

C. M. Thayer, for the defendant.

W. Thayer, (*F. A. Walker* with him,) for the plaintiff.

BRALEY, J. The plaintiff seeks under the St. of 1906, c. 463, Part II, § 247, to recover damages for the destruction of a barn with its contents, alleged to have been caused by fire directly communicated by the locomotive engine of the defendant. But if the loss is unquestioned the parties were at issue as to the origin

of the fire. The defendant could show by relevant testimony, that it originated from other independent causes even if the circumstantial evidence introduced by the plaintiff seems to have been clear and abundant, that the ignition of the roof, from which apparently the fire spread through the building, must have been from sparks emitted by the engine. *Perley v. Eastern Railroad*, 98 Mass. 414. The defendant contends, that if its offer of proof had been admitted in evidence the jury would have been warranted in finding the fire had been set by a son of the plaintiff, or at least sufficient doubt would have been raised as to its liability to have overcome the burden of proof. But in the absence of any direct evidence connecting him with the occurrence, the defendant endeavored to show from incidents in his early life, that he had acquired a disposition which had ripened into a habit to set incendiary fires whenever the opportunity offered. A habit of this character is abnormal, and it may be criminal. The defendant was required to satisfy the presiding judge, that the course of conduct on which it sought to predicate the commission of an affirmative wrongful act of the character claimed had become so continuous and systematic that the setting of the fire in question would follow as a reasonable and probable consequence. *Shailer v. Bumstead*, 99 Mass. 112. *Thayer v. Thayer*, 101 Mass. 111, 113, 114. *Commonwealth v. Abbott*, 130 Mass. 472, 473. *Hathaway v. Tinkham*, 148 Mass. 85. *Lane v. Moore*, 151 Mass. 87, 90. *Edwards v. Worcester*, 172 Mass. 104. Wigmore on Evidence, §§ 92, 376. If as a young boy he exhibited a strong inclination to set fires, and while still a youth did in several instances set them, proof of these instances would not raise a reasonable presumption that he had destroyed his mother's property wantonly, even if at the time he is shown to have been living at home. It would not follow from common experience, that because on some occasions in the past he may have done a particular thing in a particular manner, that upon another and different occasion he would act in the same way. *Robinson v. Fitchburg & Worcester Railroad*, 7 Gray, 92, 95. *Lewis v. Smith*, 107 Mass. 334. *Peckerly v. Boston*, 136 Mass. 366. It is because of this variability and uncertainty in the manifestations of individual conduct, even where the circumstances may be more or less uniform, that while an employee's general reputation for incompetency in the performance of work for which he has been engaged

is admissible, if the employer knew or by the exercise of reasonable diligence should have known of it, single instances of carelessness are inadmissible. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 14, and cases cited. The defendant moreover, if it had been permitted to litigate the likelihood of his conduct by going at large into proof of alleged instances of previous fires, would have presented collateral issues which would have seriously embarrassed and prejudiced the plaintiff, and tended to confuse and mislead the jury. *Emerson v. Lowell Gas Light Co.* 3 Allen, 410, 417. *Darling v. Stanwood*, 14 Allen, 504, 508. *Hill Manuf. Co. v. Providence & New York Steamship Co.* 125 Mass. 292, 303. *Commonwealth v. Jackson*, 132 Mass. 16, 20. *Commonwealth v. Ryan*, 134 Mass. 223, 224. *Reeve v. Dennett*, 145 Mass. 23, 28. *Lane v. Moore*, 151 Mass. 87, 90. *Commonwealth v. Hudson*, 185 Mass. 402. The subsequent incendiary fires for which the son may have been responsible as well as his admission of having set some of them, were occurrences having no connection with the plaintiff's cause of action. *Commonwealth v. Campbell*, 7 Allen, 541. And the further offer that "the district court . . . ordered an examination by two physicians, who committed him to the hospital on the ground that he had a mania for setting fires" must be construed as an offer of the record of judicial proceedings to which she was not a party or a privy. *McDowell v. Connecticut Fire Ins. Co.* 164 Mass. 394. We are therefore of opinion that the judge in his discretion properly excluded the offer of proof.

Exceptions overruled.



MARY M. GRISWOLD, administratrix, vs. BOSTON and MAINE RAILROAD.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Negligence, Railroad, Causing death, Invited person. *Agency*, Scope of employment.

In an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate,

there was evidence tending to show that on a certain morning the plaintiff's intestate and a teamster had been sent by their employer to unload bricks from a car in a freight yard of the defendant, that the car was an ordinary open freight car with the ends and sides boarded up to a height of three or four feet from the floor, and that it stood upon a delivery track in the yard with a space three and a half feet wide between it and a brick building on one side and on the other side between it and the next track a space twenty-four feet wide which was used by teams taking freight from the cars; that usually cars were switched upon the delivery track in the night-time and were left there undisturbed during the day; that the day was warm and that, in the early afternoon, the teamster drove away with a load leaving the intestate at the car; that when last seen the intestate was sitting on a corner of the car away from the outlet of the track and toward the brick building smoking, that during the absence of the teamster a switching engine removed some cars from the track, leaving a box car next to the one on which the intestate was, that later the engine returned with cars and without warning caused the box car to be pushed against the car on which the intestate was, and that immediately thereafter the intestate's body was found between the car and the brick building. *Held*, that it could not be ruled as a matter of law that the plaintiff's intestate was not in the exercise of due care. *Held, also*, that a finding was warranted that while resting on the car in the absence of the teamster the intestate was acting within the scope of his employment and was there by an implied invitation of the defendant and that there was evidence of negligence toward him on the part of the defendant.

DECOURCY, J. This is an action for damages under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of Elmer E. Griswold, the plaintiff's intestate; and the exceptions raise the questions whether there was evidence for the jury of his due care and of the defendant's negligence.*

There was evidence from which the jury could and presumably did find the following facts: On the morning of the day of the accident the intestate and a teamster were sent by their employer, the F. E. Powers Company, to unload a car containing a consignment of bricks. It was an ordinary open freight car, boarded in at the ends and sides to a height of three or four feet from the floor, and stood upon a delivery track in the defendant's freight yard. East of this track and three and a half feet away was a high brick building; and west of it was an open space twenty-four feet wide, used by teams when taking freight from the cars.

The accident happened during the early afternoon. The teamster had driven away with a load of bricks, leaving Griswold on the car to await his return for another load. The day was warm,

* The case was tried before *Lawton*, J. The jury found for the plaintiff in the sum of \$1,500; and the defendant alleged exceptions.

and Griswold when last seen was sitting on the southeast corner of the car, in the shade of the building, and smoking. Usually the cars were switched upon the delivery track during the night time, and were left there undisturbed during the day. While the intestate was on or about the car a switching engine had come upon this track and pulled away some of the cars, leaving however a box car next to that containing the bricks. Ten or fifteen minutes later the engine returned with some of the cars, and without warning pushed them against those on the track, and the box car was shoved against the brick car. Immediately thereafter, Griswold's body was found in the three and a half foot space between the track and the brick building.

Upon these facts and the inferences that properly might be drawn from them, the presiding judge could not rule as matter of law that the intestate was guilty of contributory negligence. He was not in the part of a freight yard where there was danger from the constant movement of cars. The car upon which he was at work was stationed on the delivery track, and he had no reason to expect that it would be disturbed before the removal of all the bricks. From his observation during the forenoon, aside from any information he may have acquired by inquiry or by former experience, it is not improbable that he knew it was unusual to switch upon this delivery track during the daytime, when teams might be in the adjoining driveway removing the contents of the cars. He well might assume under the circumstances that no other car would be violently pushed against the brick car without any warning being given to him. He had a right to be on the car, and from the absence of negligence in his conduct as disclosed, the jury reasonably could infer that he was in the exercise of due care at the time of the accident. *Maguire v. Fitchburg Railroad*, 146 Mass. 379. *Pratt v. New York, New Haven, & Hartford Railroad*, 187 Mass. 5. *Bachant v. Boston & Maine Railroad*, 187 Mass. 392, and cases cited.

The issue of the defendant's negligence is dependent upon the duty which it owed to Griswold at the time of the accident. Admittedly if he were then engaged in the actual work of transferring bricks from the car to the wagon, the jury might find evidence of negligence in the defendant's act of pushing the box car with such force against the brick car, without giving warning to him. *Mul-*

lins v. New York, New Haven, & Hartford Railroad, 201 Mass. 38. And the jury must have found, under proper instructions, that while on the car during the brief absence of the wagon, he was within the scope of the work of his employer, and protected by the implied invitation of the defendant to do what was reasonably necessary or convenient in the work of removing the bricks from the car. We cannot rule as matter of law that he became a mere licensee while enjoying a brief respite from exhausting labor. He had not finished all his work, as was the case in *Severy v. Nickerson*, 120 Mass. 306, nor remained upon the premises after his invitation had expired, as in *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136.

Exceptions overruled.

C. M. Thayer, for the defendant.

J. A. Thayer, C. B. Perry & P. D. Howard, for the plaintiff, submitted a brief.



ALBERT N. RIOPEL vs. CITY OF WORCESTER.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Public Officer. Police. Municipal Corporations, Officers and Agents. Contract, Implied in law.

One, who was appointed and has served as a reserve member of the police department of a city and has been paid therefor at a rate less than that paid to regular members of the department, cannot recover the difference between the pay he has received and what a regular officer would have received during the same time by showing that the ordinance of the city which provided for the appointment of reserve police officers was invalid.

There is no such relation between a city and its police officers as will oblige it to pay them for their services unless provision is made therefor by statute, ordinance or contract, and when such provision is made, the right of recovery and the amount to be recovered for services are determined, limited and regulated by its express terms, so that one, who was appointed and has served and been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he had received.

CONTRACT upon an account annexed for pay as a police officer, as stated in the opinion. Writ dated April 17, 1911.

In the Superior Court the case was heard upon an agreed statement of facts by *Hall, J.*, who found for the defendant. From a judgment entered in accordance with this finding, the plaintiff appealed.

The case was submitted on briefs.

J. H. Meagher & E. Zaeder, for the plaintiff.

E. H. Vaughan & C. S. Anderson, for the defendant.

DECOURCY, J. The plaintiff was regularly appointed a reserve member of the police department of Worcester on December 1, 1905, and served under that appointment until he left the police service February 4, 1911. He received his pay weekly and receipted upon the regular pay roll sheet for reserve policemen. During most of the time between December 1, 1906, and October 29, 1908, he was paid twenty-five cents a day less than were the regular patrolmen, whose pay was fixed by an order of the city council dated December 14, 1896; and he now seeks to recover this difference, amounting in all to \$166.25. To support his claim he contends that the city had no authority to establish a reserve police force, and that he is therefore entitled to the rate of pay fixed by the order of December 14, 1896.

The city council never accepted St. 1896, c. 314 (now R. L. c. 108, §§ 26-28), providing for the appointment of a reserve police force in cities. Presumably under the city charter, St. 1893, c. 444, § 41, which authorized the city council to establish a police department and to determine its membership, an ordinance was approved March 5, 1902, which established as a part of the police department a reserve police force, and provided that its members should receive "such compensation for time actually spent in such service as the mayor may fix."

We do not deem it necessary to consider the validity of this ordinance under which the plaintiff was appointed and served, nor the sufficiency of the mayor's action in fixing his compensation, as the plaintiff's salary has been paid and accepted under the same and as full payment for his services. *Libbey v. Lawrence*, 128 Mass. 215. He cannot avail himself of the order of December 14, 1896, because obviously that applies only to the pay of the regular patrolmen, and in fact was passed more than five years before a reserve police force was created. And as he never was appointed or served as a regular patrolman he would not be entitled to com-

pensation as such even if the ordinance of March 5, 1902, were invalid. An invalid appointment to one office would not operate as a valid appointment to a different one.

Nor can he recover on a *quantum meruit*, especially in the absence of any evidence as to the value of his services. Police officers are state or public and not corporate or private officers. There is no such relation between the city and the officers which it is required by law to elect or appoint as will oblige it to make compensation to them for their official services unless provision is made therefor by statute, ordinance, or contract. And when such provision is made, the right of recovery and the amount to be recovered for services are determined, limited and regulated by its express terms. *Sikes v. Hatfield*, 13 Gray, 347. *Brophy v. Marble*, 118 Mass. 548. *Phelon v. Granville*, 140 Mass. 386. *Cook v. Springfield*, 184 Mass. 247. 1 Dillon, Mun. Corp. (5th ed.) § 422.

In accordance with the agreed statement of facts the entry is to be made

Judgment for the defendant.

PATRICK J. BANAGHAN vs. COUNTY COMMISSIONERS OF
WORCESTER.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Certiorari. County Commissioners. Railroad.

On a petition for a writ of certiorari to quash the proceedings of county commissioners under St. 1906, c. 463, Part II, § 78, prescribing the limits within which certain land of the petitioner might be taken by a railroad corporation, the answer of the respondents is conclusive as to their findings of fact stated therein, and only errors of law apparent on the record are open to correction.

The rule that a writ of certiorari lies only for the correction of errors of law apparent on the record is not changed by St. 1902, c. 544, § 27, which provides that the court may quash or affirm the proceedings in question, or may make such order, judgment or decree as law and justice may require.

A railroad corporation, which has leased its property to another railroad corporation but retains its corporate existence, can maintain a petition to the county commissioners under St. 1906, c. 463, Part II, § 78, for an order prescribing the

limits within which the petitioner may take land that is necessary for additional tracks and cannot be obtained by agreement with the owner, and upon such petition it is immaterial whether the lease made by the petitioner is valid or invalid.

PETITION, filed on July 10, 1911, for a writ of certiorari to quash the proceedings of the county commissioners of the county of Worcester in prescribing the limits within which certain land of the petitioner on Kansas Street in Worcester might be taken by the Providence and Worcester Railroad Company upon a petition filed by that corporation on May 5, 1911, under St. 1906, c. 463, Part II, § 78.

The petition alleged as causes of error in the proceedings of the respondents (1) that the petitioner was given no notice of the hearing before the commissioners, and (2) that the Providence and Worcester Railroad Company had leased its property to the New York, Providence and Boston Railroad Company under authority of St. 1889, c. 345, and afterwards had joined in a lease of its property to the New York, New Haven, and Hartford Railroad Company, which was alleged to have been unauthorized, and that by this lease the Providence and Worcester Railroad Company had abandoned the operation of its road.

The return or answer of the respondents, after annexing a copy of the record of the proceedings before them, certified that, in addition to the facts stated in their decree and appearing upon their record, they found upon the evidence, that the Providence and Worcester Railroad Company was a corporation organized under the laws of this Commonwealth for the purpose of building and operating a railroad from the city of Worcester to the city of Providence, that it had leased its road to the New York, New Haven, and Hartford Railroad Company for the purpose of operation, but that the Providence and Worcester Railroad Company retained title to all the real estate belonging to it, subject only to the lease, that a part of such real estate adjoined land of the petitioner, that the petitioner had had full and actual notice of the proceedings on the petition before the commissioners, and that the Providence and Worcester Railroad Company required the land of the petitioner, outside the limits of the route fixed, for the purposes set forth in its petition, and was unable to obtain such land by agreement with the owner.

The case was heard by *Rugg, C. J.*, who ruled that the petition for a writ of certiorari could not be maintained. The petitioner alleged exceptions to the ruling "upon the alleged ground that it appears on the record that the Providence and Worcester Railroad could not maintain the petition granted by the respondents."

W. C. Foley, for the petitioner.

R. B. Dodge & A. J. Young, for the respondents, were not called upon.

BRALEY, J. The return of the respondents, who acted as county commissioners in the proceedings which the petitioner desires to have quashed, is conclusive as to their findings of fact, and only erroneous rulings of law can be reviewed and corrected. *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206. *Ward v. Aldermen of Newton*, 181 Mass. 432. The St. of 1902, c. 544, § 27, has not abrogated this rule but only provides, that the court instead of being limited to an order of affirmance, or reversal may direct such judgment or decree to be entered by the commissioners as law and justice may require. *Weston v. Railroad Commissioners*, 205 Mass. 94. *Leahy v. Street Commissioners*, 209 Mass. 316, 317.

The petitioner does not contend that the corporation known as the Providence and Worcester Railroad Company has been dissolved or its corporate powers diminished, and it is immaterial whether the lease of its railroad to another railroad company is valid or invalid. The company had not parted with its ownership, and if land for additional tracks became necessary, but could not be purchased from the owner, it could proceed under the provisions of the St. of 1906, c. 463, Part II, § 78, which read as follows: "If a railroad corporation, for the purpose of making or securing its railroad or for depot or station purposes, requires land or materials outside the limits of the route fixed, or requires additional land for one or more new tracks adjacent to other land occupied by such corporation by a track or tracks already in use, and is unable to obtain it by agreement with the owner" the county commissioners upon application, and after notice to the owner, may prescribe the limits within which it may be taken without his permission by right of eminent domain under § 83. The petition of the company having contained the essential allegations required

by the statute, and the respondents having found the allegations to be true, no occasion is shown for any modification of their order or decree.

Exceptions overruled.

MICHAEL F. McMAHON vs. INHABITANTS OF HARVARD.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Way, Public: want of sufficient railing.

In an action against a town under R. L. c. 51, § 18, for an injury to a horse of the plaintiff by reason of a want of a sufficient railing on a public way of the defendant, it appeared that the way in question was a country road, that the adjoining land was two and a half feet below the level of the road and that the defendant maintained on the top of the retaining wall a one-rail fence, which was in a defective condition of which the defendant had had notice, that the plaintiff was driving a pair of horses attached to an empty wagon, that a loose stone about the size of a man's fist, used by teamsters to block their wheels in going up hill, had been left in the road, that the right front wheel of the plaintiff's wagon came in contact with this stone, causing the pole of the wagon to swerve and throw the right hand horse off his balance, that the horse staggered against the railing, which broke, and that his right hind leg went over the retaining wall, causing the injury. *Held*, that the question whether the defective railing was the sole cause of the injury was one of fact to be submitted to the jury.

TORT under R. L. c. 51, § 18, against the town of Harvard for injury to a horse of the plaintiff alleged to have been sustained on August 11, 1911, by reason of a want of a sufficient railing on Fairbanks Street, a public way which it was the duty of the defendant to maintain and repair. Writ in the Second District Court of Eastern Worcester dated October 3, 1911.

On appeal to the Superior Court the case was tried before *Sanderson, J.* The facts which were shown by the plaintiff's evidence are stated in the opinion. Fairbanks Street was a country road and the part of it where the accident occurred was a hill or incline with woods on both sides of the road. The stone wall mentioned in the opinion was referred to in the evidence as "the bank wall." The top of it was level with the road. The plaintiff testified that the trig stone mentioned in the opinion was "something about the size of my fist, might be a little larger," and that

it was "a small stone some of the teamsters use to trig their wheels as they went up the hill."

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. E. O'Toole, for the plaintiff.

W. H. Atwood, for the defendant.

DECOURCY, J. This is an action under R. L. c. 51, § 18, to recover damages for injuries to the plaintiff's horse caused by the alleged negligence of the defendant in failing to maintain a sufficient railing along one of its public ways.

The plaintiff was driving a pair of horses, hitched to an empty wagon, on the right hand side of Fairbanks Street, and having turned aside to allow another team to pass, he stopped for a few moments. His wagon was then about two feet from the side of the way. At that point the adjoining land was two and a half feet below the level of the road, and a one-rail fence on top of a stone wall was maintained there by the defendant. After the team started again the plaintiff's horses had taken but two or three steps when the pole hit the right hand horse and threw him off his balance; he staggered against the railing, the rail broke, and the horse's right hind leg went over the wall. One witness testified that the horse appeared to be frightened, and that his leg did not strike the rail with any great force.

There was ample evidence for the jury of the plaintiff's due care; of the necessity of a railing for safe and convenient travel upon Fairbanks Street at the place of the accident; and of the defective condition of the railing maintained there. It was also for the jury upon the evidence to say whether this condition was known, or by the exercise of reasonable care and diligence would have been known by the proper officers of the town; whether the plaintiff's loss of control of his horse, if any, was merely momentary; and whether the injury would have been prevented if the railing had been in proper condition. *Coles v. Revere*, 181 Mass. 175. *Thompson v. Boston*, 212 Mass. 211. *Noyes v. Gardner*, 147 Mass. 505.

The only doubtful question in the case is, whether the defective railing was the proximate and sole cause of the accident. This question arises from the presence in the road of a trig stone, about the size of a man's fist, with which the right front wheel of the wagon came in contact, thereby causing the pole to which the

horses were attached to swerve and throw one horse off his balance. Assuming that the trig stone was a concurring cause of the accident, nevertheless it would not break the causal connection between the defective railing and the injury, and thereby relieve the town, unless its presence in the road was due to negligence. The law may regard a defect as the sole cause of an accident and hold a town responsible therefor, although the innocent act of the plaintiff or of a third person intervenes between the defect and the injury. As was said by Holmes, J., in *Hayes v. Hyde Park*, 153 Mass. 514, 516, "The mere fact that another human being intervenes is not enough. . . . His intervention is important not *qua* cause, but *qua* wrongdoer. . . . It is because the act is wrongful, including under this head negligence, not because it is a concurring cause, that the defendant escapes." Accordingly in *Palmer v. Andover*, 2 Cush. 600, it was recognized that if the accident was due to a defect in the way co-operating with a failure on the part of the carriage or harness, not attributable to negligence, the town would be liable. So in *Alger v. Lowell*, 3 Allen, 402, the fact that the plaintiff was pushed from the street down an unguarded declivity, by a crowd whose action was not wilful or negligent, did not prevent the plaintiff from recovering for injuries sustained by reason of the absence of a railing; and in *Hayes v. Hyde Park*, *supra*, it was held that a town might be liable for a sagging wire that constituted a defect in the way although the innocent act of a third person brought the plaintiff into contact with it. See also *Sears v. Dennis*, 105 Mass. 310; *Williams v. Leyden*, 119 Mass. 237; *Flagg v. Hudson*, 142 Mass. 280; *Pomeroy v. Westfield*, 154 Mass. 462; *Clinton v. Revere*, 195 Mass. 151. It is clear that if the plaintiff's horse had been thrown off his balance by stepping upon this loose stone instead of by reason of the wheel coming in contact with it, the case would have been one for the jury. *Lyman v. Amherst*, 107 Mass. 339.

Neither party contended that this trig stone on a country road constituted a defect in the way; and on the evidence it could not be ruled as matter of law that its presence there was due to negligence. We are of opinion that the question whether the defective railing was the sole cause of the injury was one of fact, and that the case should have been submitted to the jury.

Exceptions sustained.

PETER CASAVANT vs. WILLIAM H. SHERMAN.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, BRALEY, & DECOURCY, JJ.

Contract, Performance and breach. Practice, Civil, New trial.

In an action for the alleged breach of a contract in writing, by which the defendant agreed to hire the plaintiff for the period of one year and to pay him \$4 a day, and the plaintiff agreed "to use his best efforts to further the interests of" the defendant, where the plaintiff contends that the defendant committed a breach of the contract by discharging him at the end of six months, and the defendant contends that he was justified in terminating the contract because the plaintiff had broken it, the defendant may show a breach of the contract by the plaintiff by evidence of a series of omissions in performance, no one of which alone would constitute a substantial breach of the contract, and on such evidence it is a question for the jury whether the plaintiff had failed to perform his part of the contract substantially.

It seems, that one who, having previously been engaged in taking contracts for lathing houses, enters the employ of a lathing contractor under a contract by which he is to receive \$4 a day and agrees "to use his best efforts to further the interests of" his employer, is not excused by an inability to read and write from an obligation to keep account of the times and amount of the work done by the men placed under him.

The denial of a motion for a new trial, asked for on the grounds that the verdict was against the law, that it was against the evidence, and that it was against the law and the evidence, where the judge in denying the motion stated that he did so as a matter of discretion and that no ruling of law had been made, affords no ground for exception.

CONTRACT for the alleged breach of a contract in writing, whereby the defendant agreed to employ the plaintiff for one year from August 19, 1908, and to pay him \$4 a day, alleging that the defendant wrongfully discharged the plaintiff on February 20, 1909. Writ in the Central District Court of Worcester dated March 23, 1910.

On appeal to the Superior Court the case was tried before *Laroton, J.* It appeared that the plaintiff was a lather, who took contracts for lathing buildings, and that the defendant also was a lather, who took similar contracts, that on August 17, 1908, the plaintiff and the defendant made the agreement sued upon, in which the defendant was described as the party of the first part

and the plaintiff was described as the party of the second part. The contract provided as follows:

"That the said party of the first part agrees to hire for a period of one year from and including August nineteenth, nineteen hundred and eight, the said party of the second part, and to pay him, the said party of the second part the sum of four dollars (\$4.00) per day, eight hours to constitute a day's work. . . . And the said party of the second part agrees to use his best efforts to further the interests of, to obtain work and contracts for, and to turn over all work that may come to him to, the said party of the first part."

The plaintiff entered the employ of defendant under the terms of the contract, and was assigned to work by the defendant. He continued to work until February, 1909, when he was dismissed by the defendant.

The evidence showed that the plaintiff was a rapid worker and did nearly twice the work of other men; that he took about eighteen contracts during the time of his employment and turned all of them over to the defendant. The plaintiff contended that he had faithfully performed his part of the contract and was willing to continue his services under its terms until the expiration of the year, but that he was prevented from doing so by the action of the defendant in discharging him.

The defendant introduced evidence that the plaintiff had thrown away some small wire brads, which were of no value, that he had miscalculated the number of laths used on a building, making a difference of about \$4, and that he had miscalculated the amount of wire lathing used on a certain hospital, making a difference of about twelve or fifteen dollars.

The defendant testified that he placed the plaintiff in charge of several gangs of men on different jobs and told him to keep account of the time they worked and the amount of work done, etc., and that the plaintiff told him that he could not do it, because he could neither read nor write; that he was ready and willing to do anything else, but he could not keep accounts, that, when he was in business for himself, he had a few men to work for him, and he made certain marks in a book which he himself could understand and in that way got along, but that he could not keep account of a large number of men on different jobs. This refusal of the plaintiff was the principal ground relied upon by the defendant for dis-

charging the plaintiff, the defendant contending that the plaintiff's refusal to keep the accounts was a breach of the contract.

The judge in his charge to the jury gave the following instructions:

"You have got to take up the various things to which he has called your attention here and you are to say what are the facts about the various things which the defendant has called your attention to and then say taking them altogether was there a substantial variance of the contract. The plaintiff is in the attitude of saying that it is quite possible that if you take everything that he has given you here, and then take each one of those things by itself and throw out everything else and say this is the only thing that we might find here, you might very well say, 'why that is not enough to say that there is any variation of the contract,' but the position of the defendant is here that there are quite a number of things any one of them if considered alone, perhaps no one of them is sufficient to authorize the defendant to say that the contract was broken, but he says that they indicate a failure on the part of this plaintiff to use his best efforts to further the interests of his employer. And that they came to be to such an extent that after a while he was fairly warranted in saying that this man did not intend to comply with that contract which required him to further his best interests. That he was, so to speak, going it alone; that what he was doing was not an advantage to the business, and that therefore he had substantially broken the contract and he was therefore authorized to tell him so and say to him that he could not go along with him any further; and by the defendant telling him so, was simply notice to him that 'I recognize that you have hitherto broken the contract and I notify you I consider myself no longer bound by it.' If you say that is what you find here, if you find the defendant [plaintiff] did not comply with the contract, that he had broken it, even if you cannot put your finger on the precise minute when you say he had a right to say the contract had been broken, if you say the contract had been broken by this course of conduct on the part of the plaintiff then the plaintiff cannot recover." The plaintiff excepted to these instructions.

The jury returned a verdict for the defendant, and the plaintiff filed a motion for a new trial on the grounds that the verdict was against the law, that it was against the evidence, and that it was

against the law and the evidence. The judge denied the motion, stating that he did so as a matter of discretion and that no ruling of law had been made. The plaintiff alleged exceptions.

The case was submitted on briefs.

S. G. Friedman, J. W. Sheehan & L. Cutting, for the plaintiff.

J. A. Thayer, C. B. Perry & P. D. Howard, for the defendant.

BRALEY, J. The stipulations of the parties to the contract were mutual and dependent, and, if after it had been partially executed the defendant by discharging the plaintiff made further performance impossible, he is liable in damages, unless the discharge could be justified on the ground of the plaintiff's defaults. *Hodgkins v. Moulton*, 100 Mass. 309. *Hapgood v. Shaw*, 105 Mass. 276. *Earnshaw v. Whittemore*, 194 Mass. 187, 192. Accordingly the question at the trial was whether the alleged omissions put in evidence by the defendant were a sufficient justification. It is settled that, while inadvertent or unimportant departures would not defeat the right of recovery, the plaintiff became bound to a substantial performance in furtherance of the objects intended to be accomplished. *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 592. *National Machine & Tool Co. v. Standard Shoe Machinery Co.* 181 Mass. 275.

The plaintiff, who had been engaged in taking contracts for lathing houses, and who seems to have acquired quite a patronage, which the parties intended should be transferred as far as possible to the defendant, engaged "to use his best efforts to further the interests of, to obtain work and contracts for, and to turn over all work that may come to him to, the said party of the first part." A general course of conduct which would enure to the defendant's benefit is here prescribed in unambiguous words. The defendant, never having been informed to the contrary, had the right to assume from the plaintiff's previous experience, that when placed in supervision of work contemplated by their agreement his business qualifications were sufficient to enable him to act efficiently. And the plaintiff, although testifying that he had faithfully complied with his obligations, does not contend that the defendant's orders, which the evidence tended to show he had not properly executed, or declined to execute because of inability to read or to write, imposed duties for the performance of which he had not contracted.

The true interpretation and construction of the contract, as urged by him, undoubtedly was for the court, and his counsel argue in their brief that the presiding judge should have so ruled. *Globe Works v. Wright*, 106 Mass. 207. Yet no request was made for a ruling that upon the evidence the defense as matter of law had not been made out. But, if asked for, the ruling could not have been given as the facts were in dispute. The jury were to determine whether the various acts of omission had been proved, and, if proved, they were further to decide whether when viewed as a whole, even if any one of them might have been insufficient, the defects in performance reasonably warranted the inference that the plaintiff would not or could not properly exert himself in the promotion of the defendant's interests. *Chapman v. Coffin*, 14 Gray, 454. *Cabot v. Winsor*, 1 Allen, 546. *Cunningham v. Washburn*, 119 Mass. 224. The instructions to which the plaintiff excepted carefully pointed out the nature of the evidence on which the defendant relied, and the judge having correctly ruled, that, while unsubstantial departures would not be enough, yet, if the jury were convinced that there had not been a substantial compliance with his promise, the plaintiff had broken his contract, the verdict for the defendant should not be disturbed.

A motion for a new trial is addressed to the discretion of the court, and unless rulings of law are made at the hearing the denial of the motion affords no ground of exception. *Lopes v. Connolly*, 210 Mass. 487.

The order of the judge comes within the rule, and it follows that on each branch of the case the exceptions must be overruled.

So ordered.

OREN R. WILLIAMS vs. JOSEPH P. BRENNAN.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Dog. Proximate Cause.

If the act of a dog causes an automobile to skid from the right hand side of a public way and to come directly in front of a horse that is being driven slowly in the opposite direction on the other side of the way, whereupon the horse rears and descends on the top of the automobile, injuring it, in an action by the owner of the automobile against the owner of the dog under R. L. c. 102, § 146, for double the amount of the damages thus sustained, the jury is warranted in finding that the dog was the sole, direct and proximate cause of the injury.

LORING, J. This is an action under R. L. c. 102, § 146, to recover double damages for injury done by the defendant's dog to the plaintiff's automobile. The presiding judge* refused to direct a verdict for the defendant and the case is here on an exception to that ruling.

It appeared that as the plaintiff was driving his automobile on the right hand side of a public way at the rate of some fifteen miles an hour, and as an ice wagon with a single heavy horse was being driven slowly in the opposite direction on the other side of the road, the defendant's dog was seen to "go" into the way some thirty or forty feet ahead of the plaintiff. The dog, which was a large one weighing one hundred and thirty-five pounds, ran toward the plaintiff's automobile, barking as he ran; when he reached the automobile he snapped at the right fore tire, but missed it, and his body struck the left fore wheel; this caused the automobile to skid to the other side of the road so that "the automobile, still in contact with the dog, came directly in front of the" horse of the ice wagon. "The dog did not touch the horse, but when the automobile came in front of the horse as aforesaid, the horse reared and descended upon the top of the automobile, causing injuries to it for which this action is brought."

The only contention made by the defendant is that on this

* Quinn, J.

evidence the jury were not warranted in finding that the dog was the sole, direct and proximate cause of the injury. *Denison v. Lincoln*, 131 Mass. 236, is decisive against that contention.

Exceptions overruled.

J. D. Graham, for the defendant.

H. W. Blake, for the plaintiff.



ELLEN L. ALLEN, administrator, *vs.* WILLIAM H. ALLEN.

Worcester. September 30, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Equity Jurisdiction, Fraud. Husband and Wife. Equity Pleading and Practice, Findings of master.

In a suit in equity by a widow against a nephew of her deceased husband to have certain deeds of real estate from her husband to the defendant set aside as a fraud on her marital rights, where it appears that the conveyances complained of were founded on good and valid considerations, it is necessary for the plaintiff to prove not only that the conveyances were made in fraud of her marital rights but also that the defendant knew or had notice of that fact.

In a suit in equity by a widow against a nephew of her deceased husband to have two deeds of real estate from her husband to the defendant set aside as a fraud upon her marital rights, it appeared from a master's report that when the deeds were made the plaintiff's deceased husband was seventy-eight years of age and that an action brought by the plaintiff against him for breach of promise of marriage was pending, that the defendant as consideration for the conveyances gave the deceased a bond for his support during his life and further agreed that the deceased should have the net income of the real estate during his life, that three weeks after the execution of the second of the deeds to the defendant the action for breach of promise was settled by the payment of a sum of money to the plaintiff, that a week later the plaintiff married the deceased, that two days before the marriage the defendant recorded the deeds, and that the defendant never informed the plaintiff that he had the deeds of the property or that he had given the bond for support. The master found that one of the motives of the deceased in making the conveyances was to deprive the plaintiff of all interest in the real estate upon his death and that "the defendant took said deeds with full knowledge of the effect of the transfer upon the plaintiff's rights, if any." It further appeared, that the deceased lived for more than eight years after his marriage to the plaintiff, that during this time the plaintiff "skillfully performed the work of keeping the house and caring for her husband," and that, although during these years the deceased was in full enjoyment of the granted premises, the defendant furnished him with support to an amount found by

the master. *Held*, that it could be found that the bond for the support of the deceased was given in good faith and was a good consideration for the conveyances; and that, the conveyances having been made after the action for breach of promise had been brought and before it was settled, when the relation of the plaintiff to the deceased was that of creditor, it could be found that the conveyances when made were not a fraud on the plaintiff's marital rights.

A suit in equity by a widow against a nephew of her deceased husband, to have two deeds of real estate from her husband to the defendant set aside as a fraud upon her marital rights, came before this court on an appeal from a decree dismissing the bill upon the report of a master which did not contain the evidence before him and to which no exception was taken. The master's report warranted findings that the deeds from the deceased to the defendant, which were made respectively six weeks and a month before the plaintiff's marriage to the deceased, were given for good and valid considerations and that the conveyances when made were not a fraud on the plaintiff's marital rights. The master found that on the day of the marriage and at various times previously the deceased had stated to the plaintiff, "that all his property remained in his name," that the plaintiff relied on his statements that the real estate conveyed to the defendant was his and that this was one of the considerations which induced her to marry him. It was not found by the master that the defendant knew of these statements. *Held*, that although the false statements of the plaintiff's husband "that all his property remained in his name" were a fraud on the plaintiff's marital rights, yet, the master having made no finding that the defendant knew of these statements and the evidence not being reported, no finding of such knowledge could be made by this court.

LORING, J. This case comes up on an appeal from a decree* dismissing the bill of complaint. The decree was entered on a report which did not contain the evidence before the master and to which no exceptions were taken.

The bill was brought by a widow against the nephew of her deceased husband to have two deeds of real estate situate in West Brookfield, made by the husband to the nephew, set aside as a fraud on her marital rights.

The facts found by the master are these: The plaintiff and Seth Allen her deceased husband were married on November 22, 1900, and the deeds were executed, one on October 11, 1900, forty-two days, and the other on October 25, 1900, twenty-eight days before the marriage ceremony. At the time that they were executed an action was pending, brought by the plaintiff against Allen for breach of promise of marriage. In May, 1897, Allen, who was then seventy-five years of age, had made the plaintiff an offer of marriage, stating that he had the "two pieces of property" cov-

* The decree was made in the Superior Court by *Hall, J.* The master was Edward T. Esty, Esquire.

ered by these deeds, and orally agreeing that if she married him she should have, on his death, what property he had. Thereupon the plaintiff went to Seth's house "with the expectation of immediate marriage" and remained there for three years and one month; during this time she acted as housekeeper without compensation and paid "a substantial amount of her own money" in household expenses. The day after she left, Seth followed her to Boston and signed a written agreement to marry her within two weeks. She returned to his house on the same day. At the end of two months, namely, in September, 1900, the marriage not having taken place, the plaintiff again left Seth's house and brought the action for breach of promise of marriage. The master found that the two deeds here in question were given by Seth to the nephew "for the love, affection and kindness shown him" by the nephew, and also in consideration of a bond for his support during life, given by the nephew to Seth. This bond of support is dated in October, but the day of the month was left blank. Under date of November 1, 1900, an agreement was made by which, after reciting that Seth had conveyed to the nephew two parcels of land and had received as consideration therefor a bond for support, the nephew agreed, at Seth's "request and in part fulfilment of the conditions of said bond," that Seth should have the income of the real estate during his life (he paying insurance and taxes), and that if he should leave a widow, she should have the same right for one year after his decease. This agreement was executed and delivered at "about the time of the transfer of the property" to the nephew. The master found that "one of the motives actuating Seth in making these conveyances to the defendant was to deprive the plaintiff of all interest in these two estates upon his death," and that "the defendant took said deeds with full knowledge of the effect of the transfer upon the plaintiff's rights, if any." During the months of September, October and November, Seth visited the plaintiff in Boston and sent the defendant to her to settle the action and induce her to return. She refused to return until she had been paid \$2,000 in settlement of the action brought by her. This was paid to her by the defendant in Seth's behalf on November 15, 1900, and she returned with the defendant to Seth's house on that day. The two deeds here in question were recorded on November 20, 1900. Two days afterwards, on

November 22, 1900, Seth and the plaintiff were married. On the day of the marriage and "at various times before," Seth stated to the plaintiff "that all his property remained in his name" and the plaintiff relied on the fact that as stated by Seth the land covered by the two deeds here in question was his; and "this fact was one of the considerations which induced her to marry him." A short time after her marriage the plaintiff went to the registry of deeds and there first learned of the existence of the two deeds. She did not know of the bond for support or of the agreement as to the rents until after her husband's death. Her husband died on February 22, 1909. She was a faithful wife to her husband during the eight years and three months of their married life. In addition the master found that "the defendant at all times did what he could to promote the marriage between the plaintiff and his uncle, and was an active agent of his uncle in the arrangements which were made and in the conferences had in September, October and November, 1900, in consequence of which the plaintiff returned to Seth's home and married him," and that "the defendant never informed the plaintiff that he had deeds of the property, nor that he had given a bond for support." Seth represented that the two lots were worth \$4,800, and they were assessed for \$4,725. The master found that "Seth lived in part of one of the houses and collected all the rents from both houses, the rental value of which was twenty-one dollars a month, until his death; and the plaintiff collected them for one year after his death, in accordance with said agreement." It was also found by the master that "the plaintiff was in all their married life an efficient and faithful wife, and skilfully performed the work of keeping the house and caring for her husband," and that "while the defendant rendered other services to his uncle, all the expenditures and charges which the defendant . . . made on his account" amounted to \$617.44. At his death Seth left personal property inventoried at \$2,680.

As the conveyances here complained of were founded on both good and valid considerations, it was necessary for the plaintiff to prove not only that they were made in fraud of her marital rights but that the defendant knew or had notice of that fact. See *Snow v. Paine*, 114 Mass. 520, 525; *Green v. Tanner*, 8 Met. 411, 419. The conveyance in *Chandler v. Hollingsworth*, 3 Del. Ch. 99, which

is mainly relied on by the plaintiff, was a voluntary one in which case the grantee stands in the shoes of the grantor, and it is not necessary to prove that the grantee had knowledge or notice of the grantor's fraud.

The fact that the defendant gave back to Seth the agreement whereby he was entitled to occupation of the premises during his life, unexplained, gives the conveyances the look of being colorable ones merely. And the fact that the deeds were not recorded by the defendant until after the action for breach of promise had been settled and until within two days of the marriage gives rise to a suspicion as to the defendant's good faith. But it is a fact that these conveyances were made after the action for breach of promise of marriage had been brought and before it was settled. At that time, on the facts found by the master, the plaintiff was a creditor of Seth Allen and the conveyances might be found to be a fraud on her rights as a creditor, but as no agreement of marriage then existed between them it would be hard to make out that the conveyances were a fraud on the plaintiff's marital rights. And a consideration of Seth's condition at that time goes far to remove, if it does not entirely remove, the impression that these conveyances taken in connection with the agreement back giving Seth a right of occupation were colorable merely. At the time of the conveyances, on the facts found by the master, Seth was under liability to the plaintiff for an undetermined amount. It may be inferred from the facts stated in the master's report that he had some \$4,600 in money and these two parcels of real estate. He was then seventy-eight years old. Under the circumstances he well might want to secure support during the rest of his life. And the subsequent fact that although Seth was in full enjoyment of the granted premises the defendant furnished him with support to the amount of \$617 is some evidence that the previous transaction was not a colorable one. In that connection it is to be remembered that at the time of the conveyances it could not be assumed that a marriage between the plaintiff and Seth ever would take place. Under these circumstances the amount likely to be expended in Seth's support might be thought to be greater than the amount subsequently expended; for the plaintiff as a wife afterwards performed without compensation the duties of a housekeeper.

For these reasons these conveyances when made hardly could be found to be a fraud on the plaintiff's marital rights. But there was a fraud on her marital rights when in spite of these conveyances Seth stated to the plaintiff at various times before their marriage and on the day of the marriage that "all his property remained in his name." It is not found by the master that the defendant knew of these statements by Seth. The master went no further than to find that "the defendant took said deeds with full knowledge of the effect of the transfer upon the plaintiff's rights, if any." The fact that the deeds were not recorded by the defendant until two days before the marriage and were recorded by him then raises a suspicion as to his good faith. But suspicion is not proof, and the burden of proving bad faith was on the plaintiff. What explanation, if any, was given by the defendant for his not recording the deeds before November 20 and for recording them then (two days before the marriage) we do not know. The evidence on which the master made his findings is not before us. The master not having found that the defendant knew of his uncle's fraud, nor facts tantamount to that, in the absence of the evidence on which the master acted we cannot now make a finding to that effect.

Decree affirmed.

J. C. Hammond, (H. C. Davis with him,) for the plaintiff.

J. R. Thayer, (H. H. Thayer & H. E. Cottle with him,) for the defendant.

MINNIE A. WADE, executrix, *vs.* KATE E. SMITH.

Worcester. October 1, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Gift. Savings Bank.

At the hearing by a judge without a jury of an action by the executor of the will of one P against P's daughter, K, for the amount of two savings bank accounts, there was evidence which tended to show that P on the same day made two deposits in a savings bank, one under the title, "P payable in case of his death to K," and the other under the title, "K payable in case

of her death to P;" that later, in a conversation between P, the defendant and a friend, either P or the friend for him stated that the money represented by the deposits was given to the defendant, that at that time the defendant saw and examined the savings bank books and understood that the legal title to the deposits passed to her, and that later both books were delivered to her. *Held*, that a finding of a completed gift of the bank deposits to the defendant was warranted by the evidence.

RUGG, C. J. This action at law comes before us on an exception to the refusal of a judge of the Superior Court,* who heard the case without a jury, to find in favor of the plaintiff. The only question is whether upon all the evidence a finding for the plaintiff was required as matter of law. The weight and effect of oral evidence was for the trial judge, and his finding will not be disturbed unless it appears to be wholly unwarranted. *Bailey v. Marden*, 193 Mass. 277. The bill of exceptions does not state that it contains all the material evidence, and perhaps on this ground it would be necessary to overrule the exceptions. But we prefer to consider the case on its merits.

The issue is the title to two deposits in a savings bank made by the father of the defendant in these forms respectively: "Plimpton H. Smith payable in case of his death to Kate E. Smith," and "Kate E. Smith payable in case of her death to Plimpton H. Smith." The defendant testified, in substance, that these two deposits were made by her father out of his money on the same day, and that later on there was a conversation in which the father, a friend of his named Porter and the defendant participated, when it was said by the father or Mr. Porter speaking for him that the money represented by these two deposits was given to the defendant and was to be hers, and that she understood the legal title to the two deposits passed to her. The books were seen and examined by the defendant at the time, and subsequently both were delivered to the defendant. This evidence was enough to show an executed gift. *Peck v. Scofield*, 186 Mass. 108. *Bone v. Holmes*, 195 Mass. 495. *Scrivens v. North Easton Savings Bank*, 166 Mass. 255. It would support a finding of delivery with intent to pass title by the donor and acceptance by the donee. *Bailey v. New Bedford Institution for Savings*, 192 Mass. 564, 569. Other aspects of the evidence with legitimate inferences would warrant

* *Hall, J.*

a conclusion that as to the deposit in form "Plimpton H. Smith payable in case of his death to Kate E. Smith," the delivery of the book was subject to the trust that so much of it as was necessary should be used by the donee for the support of the donor during his life, and that subject to this trust the title passed to the defendant. See *Kelley v. Snow*, 185 Mass. 288. A finding for the defendant therefore is fully supported by evidence.

There was evidence from which a conclusion adverse to the claims of the defendant might have been drawn. But the witnesses were seen and heard in the Superior Court, and it follows from what has been said that there is no ground to reverse his finding.

Exceptions overruled.

M. M. Taylor, (*G. C. Douglass* with him,) for the plaintiff.

W. O. Kyle, for the defendant.

THOMAS ALLEN, trustee, & others *vs.* CHARLES L. BARRETT
& another.

Worcester. October 1, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Equitable Restrictions. Equity Jurisdiction, To restrain violation of equitable restrictions, Laches, Mandatory injunction. *Equity Pleading and Practice*, Parties.

The owner of a tract of twenty acres of land in a city laid it out as a residential section and expended large sums of money in developing it. All deeds of lots from the tract contained similar conditions and restrictions as to the kind, cost, use and position of buildings to be erected thereon. At the time when the owner purchased the tract there stood on one lot a two family house, and he conveyed that lot and the one adjoining it by a deed containing the following restrictions: "On neither lot . . . shall there be built or maintained more than one dwelling house, nor a dwelling house costing less than . . . (except that the present house now standing may be maintained there as the sole house on its lot), nor shall such building be constructed or maintained other than for a single family or as a double, otherwise called a semi-detached house." A successor in title to the grantee began to alter the building into a three-story tenement house, and the original owner, who still owned lots in the tract, sought by a suit in equity to restrain him from doing so. *Held*, that the suit might be

maintained, since the restrictions prohibited the construction and maintenance of a three-story tenement house, regardless of the extent to which the old building entered into its construction.

Where the owner of a large tract of land from which he had conveyed several lots subject to valid building restrictions first learned of certain building operations by the owner of one of the lots which were in violation of the restrictions and which had been carried on for about six weeks in such a way that the owner of the large tract did not have any actual knowledge of the intent of the violator of the restrictions, and where the owner of the large tract a few days after his discovery communicated with the person violating the restrictions and, the building operations being stopped, began a suit in equity to enjoin the operations about two months later, a finding that the plaintiff was not guilty of laches is warranted.

Where the owner of a large tract of land in a city, in furtherance of and as a part of a general scheme for the development of the tract as a residential district, in all deeds of lots therefrom included restrictions of a similar, although not of precisely an identical, character, which were imposed for the benefit of all the lots in the tract, several of the grantees of such lots may join as plaintiffs in a suit in equity to restrain a successor of a grantee of one of the lots from violating the restrictions contained in the deed to his predecessor in title.

A mandatory injunction may be issued compelling the removal of structures erected upon land in violation of building restrictions to which the land was subject, although the defendant had received the land by descent and at the time that he erected the structures in question he was not aware of the restrictions which were in the deed to his ancestor.

BILL IN EQUITY, filed in the Superior Court on February 13, 1912, seeking to restrain the violation of certain building restrictions, as stated in the opinion.

The suit was heard by *Hardy, J.*, who filed a memorandum of his findings, which, besides the facts stated in the opinion, contained the following findings on the questions of laches and the form of the decree:

"The work done by the defendants in connection with such changes was begun on November 2, and continued until December 16, 1911, and in such a way that the plaintiffs did not have such actual knowledge of the intent of the defendants that I can find that they were guilty of laches. I am satisfied that the principal agent of the trustees did not have such knowledge of the proposed changes of premises at a time exceeding ten days before the defendants were notified of the existence of the restriction.

"Although I find that the defendants have incurred an expense in connection with such work to the amount of about \$1,475.00, I am satisfied that, under a reasonable discretion to be exercised by the court, the prayer for relief should be granted."

It appeared that the plaintiff Allen, trustee, still owned lots in the tract at the time the suit was begun, and that the defendants received the land by descent from their father, to whom it had been conveyed as stated in the opinion.

A decree was made restraining the defendants from proceeding further with the alteration of the house, and directing them within thirty days either to remove the portions of the building which were in violation of the restrictions referred to in the bill of complaint and to restore the building to a dwelling house for the use of one family, or at the option of the defendants to remove the building altogether from the premises. The defendants appealed.

The record contained a report of the evidence.

A. S. Houghton, for the defendants.

C. F. Aldrich, for the plaintiffs.

DECOURCY, J. The judge who saw the witnesses and heard the testimony made certain findings of fact as a basis for the decree, and these must stand unless they are clearly erroneous. In our opinion they are amply sustained by the reported evidence.

The plaintiff Allen, as trustee for himself and other beneficiaries, owned a tract of about twenty acres in the city of Worcester, and laid it out as a residential section known as Montvale. Sixty-five thousand dollars were expended in constructing streets, sewers, granolithic walks and other improvements, and in planting shade trees; and in all the deeds of lots sold there were inserted conditions and restrictions as to the kind, cost and use of the buildings to be erected, and their distance from the street line.

In August, 1900, the plaintiff Allen, trustee, conveyed to one Jesse P. Taber lots 76 and 77 on the Montvale plan. On lot 76 was a house that was on the "Warren purchase" when the trustee bought that and the "Whitman tract," from which to develop Montvale. This house had been a two-family building, but Taber changed it over into a one-family residence and occupied it as such. In his deed was the following provision: "Said tract is conveyed subject forever to the following conditions and restrictions. 1st. On neither lot 76 or 77 shall there be built or maintained more than one dwelling house, nor a dwelling house costing less than thirty-five hundred (\$3,500) dollars (except that the present house now standing may be maintained there as the sole house on its lot), nor shall such building be constructed or

maintained other than for a single family or as a double, otherwise called a semi-detached house." In December, 1905, the defendants' ancestor obtained title by deed to lots 76 and 77, "subject to restrictions mentioned in deed from Thomas Allen, trustee, to Jesse P. Taber." The defendants were altering the house on lot 76 into a three-story tenement house known as a "three decker" when the plaintiffs protested and brought this bill in equity.

There is no merit in the contention of the defendants that the specific and limited exception in the deed to Taber, permitting the maintenance on lot 76 of the existing building, exempts that building from all restrictions; and we are of opinion that the restrictions considered as a whole prohibit the construction and maintenance on the lot of a "three decker" tenement house, regardless of the extent to which the old building may enter into its construction. Accordingly the decree in favor of the plaintiff Allen was warranted unless he was guilty of laches; and the evidence sustains the judge's finding that he was not. He first heard of the alterations from Herbert A. Pratt, one of the beneficiaries of the trust; and Pratt testified that he first heard of them on Wednesday, December 14; that on the next Saturday he notified one Lassalle, who was working on the house, and on the Monday following went over the matter with the defendant, Charles L. Barrett. *Stewart v. Finkelstone*, 206 Mass. 28.

As to the other plaintiffs it is enough to say that the evidence warrants the findings of the trial judge, in effect that they were owners of other lots on the Montvale plan, that the restrictions in their deeds from the trustee were similar to those in the Taber deed, and were imposed as part of a general plan for the benefit of the several lots; that they had bought the land and erected residences thereon in compliance therewith; and that they were not guilty of laches. Under such facts the restrictions give to each grantee a right in the nature of an easement which will be enforced in equity against the grantee of another of the lots, although there is no direct contractual relation between the two grantees. And the fact that the restrictions are not exactly the same in all the deeds does not tend to show that the restriction in question was not intended to apply alike to all. *Hano v. Bigelow*, 155 Mass. 341. *Bacon v. Sandberg*, 179 Mass. 396. *Evans v.*

Foss, 194 Mass. 513. *Sayles v. Hall*, 210 Mass. 281; 14 Ann. Cas. 1021, note.

It is urged by the defendants that the decree for a mandatory injunction should not issue, because they were not aware of the restrictions in the deed to their father, under which they claim. But as they saw fit to act in ignorance of their own rights, and without considering the rights and interests of the residents of this neighborhood, the financial loss should be borne by them and not by the plaintiffs, who are in no way responsible for it. The relief granted is such as is usual in similar cases. *Kershishian v. Johnson*, 210 Mass. 135, and cases cited.

Decree affirmed with costs.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY
& another *vs.* CITY OF CHELSEA & others.

Suffolk. September 10, 1912. — October 16, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Railroad, Location. Chelsea.

Abandonment by a railroad corporation of its location or of any part thereof is not to be inferred from mere non-user.

This suit in equity by a railroad corporation and its lessee to establish their rights in a certain location through certain streets of the city of Chelsea was referred to a master who at considerable length made findings of subsidiary facts and also general findings, based on such subsidiary facts, that no abutter had acquired or had any right or interest in any part of the location referred to by reason of any adverse use or occupation thereof, that there had been no abandonment or modification of the location which reduced its width to less than that described in the bill, and that the location was valid to that width. On appeal from a decree granting the prayers of the bill, it was *held*, after a review of the master's report, that the general findings of the master were justified by the subsidiary facts found by him, and that therefore the appeal should be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 30, 1911, by the New York Central and Hudson River Railroad Company and the Boston and Albany Railroad Company against the city of Chelsea and the commissioners constituting the Chelsea board of control appointed under the provisions of St. 1908,

c. 559, seeking to establish the rights of the plaintiffs in a location through certain streets in the defendant city.

The suit was referred to Patrick H. Cooney, Esquire, as master. Among findings in his report which are not described in the opinion were the following:

St. 1900, c. 468, empowered the Boston and Albany Railroad to make the lease to the New York Central and Hudson River Railroad Company, which they did on July 1, 1900, of "all and singular its railroads and property of every description."

By deed of December 17, 1869, the Eastern Railroad Company conveyed to the Boston and Albany Railroad "the mortgage deed given by the Grand Junction Railroad and Depot Company to said Eastern Railroad Company, dated March 22, 1852, and all and singular the negotiable bonds, debts, claims, and demands therein mentioned or thereby secured, and all the rights, titles, and interests of the Eastern Railroad Company in and to the real estate thereby conveyed so far only as the Eastern Railroad Company have acquired any interest therein under and by virtue of said mortgage, not including, but especially excepting from this assignment, any and all rights, title, and interest or estate acquired by said Eastern Railroad Company in any other manner or by any other title, but including all rights, title, and interests by possession of the mortgaged premises obtained by open and peaceable entry thereon by the Eastern Railroad Company on the 6th day of May A. D. 1862, for breach of the condition of said mortgage, not opposed by the said mortgagors or any other person claiming the premises, and continued peaceable for more than three years and even since said day."

The Winnisimmet Company by deed of February 15, 1853, purported to convey to the Grand Junction Railroad and Depot Company the fee to the roadbed of the grantee "as now built and to be built."

The findings of the master as to fences put upon the location were as follows:

"Some years after the railroad was built a fence was built and for many years maintained in a more or less dilapidated condition on a line substantially thirteen feet southerly from the base line of the location, and on the line of the deed from the Winnisimmet Company to the Grand Junction Railroad and Depot Company,

dated February 15, 1853, and about thirty years ago another fence was built over a part, at least, of the location, but it was three or four feet southerly from the first fence. In 1899 another fence was built forty-one and one fourth feet southerly from the base or center line of the location of October 20, 1849, and after the agreement for compromise was made in 1903, still another fence was built twenty-eight feet southerly from said base line and on the line established by the compromise. All of these fences were built by the railroad. The land on which they were built was wet, marshy land, and so far as any use was made of it, it was used chiefly for pasturing."

The compromise made in the year 1903 is described by the master as follows: "In 1903, a dispute arose between the Boston and Albany Railroad Company and the various abuttors as to the southerly line of the railroad location, the railroad claiming that it was forty-one and one fourth feet southerly from, and parallel with, the base or center line of the location filed October 20, 1849, and the various abuttors claiming that it was but thirteen feet southerly from said line, being the line of the first tract described in the deed from the Winnisimmit Company to the Grand Junction Railroad and Depot Company, dated February 15, 1853; and the parties finally agreed, as a matter of mutual compromise, to establish the line twenty-eight feet southerly from, and parallel with, said base line, except for a short distance southwesterly of Spruce street, it was established thirty feet southerly from said base line; and to carry into effect said compromise agreement the parties interchangeably executed the necessary releases. One William Williams, who owned a triangular piece of land with a house on it on Vale street, is the only abuttor who did not join in the compromise or execute any release. His land has a boundary of eighty-five feet on the railroad, and the northeasterly corner of the ell of his house stands twenty-six and ninety-eight one hundredths feet southerly from the base or center line of the railroad. Vale street does not cross the railroad, but it leads to it."

The substance of the other facts reported by the master is stated in the opinion.

The suit was heard upon the master's report by *Hammond, J.*, and a decree was made for the plaintiffs. The defendants appealed.

The evidence was not reported.

H. W. James, for the defendants.

R. A. Stewart, for the plaintiffs, was stopped by the court.

HAMMOND, J. By this bill the plaintiffs seek to establish the location of the Grand Junction branch of the Boston and Albany Railroad at least twenty-eight feet in width over certain lands and public streets in the city of Chelsea, and ask for an injunction against any interference upon the part of the defendants, their officers, agents and servants, with the lawful acts of the plaintiffs upon such location. The defendants deny the validity of the location, and especially insist that even if there be a valid location its width is only thirteen instead of twenty-eight feet. The case was referred to a master, to hear the parties and to report his findings, "together with such facts and matters of law as either party" might request.

The master's report, to which no exceptions were taken, was confirmed, and thereupon there was a final decree for the plaintiffs; and the case is before us upon the defendants' appeal from that decree. Inasmuch as there were no exceptions to the report the only question open to the defendants is whether the decree is justified by the record.

After stating at considerable length the subsidiary facts found by him, the master makes three general findings, based, as he says, upon these subsidiary facts. These general findings are in substance that (1) "no abuttor acquired, or has any right or interest in, any part of the location . . . by reason of any adverse use or occupation thereof;" (2) that there has been no abandonment or modification of the location which reduces its width to less than twenty-eight feet; and (3) that the location is valid to the width of twenty-eight feet. If these general findings of fact are to stand, then the final decree was proper; and hence the only question before us is whether they shall stand, or, in other words, whether they are justified upon the subsidiary facts with the legitimate inferences therefrom.

On October 20, 1849, the Grand Junction Railroad and Depot Company duly filed a location five rods wide, "and the railroad was built on . . . [this] . . . location over the part thereof now in controversy." On March 22, 1852, the same company mortgaged to the Eastern Railroad Company all that portion of its railroad (describing it) including "the superstructure thereof, and

all . . . [its] . . . rights, title and interest . . . in the land over which the same is located and with the rights, privileges and appurtenances to said portion of said road . . . ; also . . . [its] . . . franchise . . . so far as the same extends or applies." The location in question is a part of the railroad mortgaged and is within the description. This mortgage was a valid mortgage. *East Boston Freight Railroad v. Eastern Railroad*, 13 Allen, 422. "The condition of this mortgage was broken, and for such breach of condition the Eastern Railroad Company, on the 6th day of March, 1862, made an open and peaceable entry upon the mortgaged premises for the purpose of foreclosing said mortgage, and recorded in the registry of deeds a certificate of said entry in due form within thirty days after said entry was made; and the said Eastern Railroad Company, and its successors and assigns have since been, and are now, in possession of the same under said mortgage title." In this way the mortgage was foreclosed, and by various acts and contracts under legislative authority this title, except so far as modified by subsequent takings, passed to the plaintiff the Boston and Albany Railroad Company and was included in its lease to the other plaintiff. See St. 1900, c. 468, and also the various agreements described in the report, especially that of December 17, 1869, between the Boston and Albany Railroad and the Eastern Railroad Company and the lease of July 1, 1900, between the former company and the other plaintiff.

The validity of this location is attacked by the defendants on various grounds. The first ground is that no compensation ever was paid to the owners of the land over which the location was made. But this contention is not sustained by the report. The master nowhere makes such a finding, and at this late day no such inference is to be drawn from the facts stated by him. The second ground is that the taking was modified as to width by the deed of February 15, 1853, from the Winnisimmet Company to the Grand Junction Railroad and Depot Company. But it is to be noted that that deed was executed several months after the mortgage to the Eastern Railroad Company, and whatever might have been the legal effect of the deed as between the parties to it, as to which we express no opinion, it is manifest that it could not affect the rights of the mortgagee without its consent. *Ellis*

v. *Boston, Hartford & Erie Railroad*, 107 Mass. 1. *Haven v. Adams*, 4 Allen, 80. There is no evidence of any such assent at that or any subsequent time.

It is further contended by the defendants that there has been an abandonment of the part of the location in controversy. In determining what acts constitute an abandonment of a railroad location it is important to bear in mind the nature of the right acquired. This right, though technically an easement, may require for its enjoyment permanent and practically exclusive use of the land. The extent to which the land to the width of five rods is needed for the operations of the railroad is a matter upon which the officers of the company are the sole judges; and it varies at their discretion with the business necessities of the company. *Brainard v. Clapp*, 10 Cush. 6. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad*, 104 Mass. 1. *Barnes v. Boston & Maine Railroad*, 130 Mass. 388. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500. In *May v. New England Railroad*, 171 Mass. 367, 369, Allen, J., uses the following language: "Where land is taken for a railroad, the original owner retains all his rights which are consistent with the full enjoyment of the easement acquired by the railroad company. The two rights exist together, and the railroad company is not legally injured by any use of the land by the owner which does not interfere with the easement taken. . . . With growing needs the company's right of use may increase, and that of the original owner may decrease. The railroad company is not limited in its right by the use which it makes at the outset, and it may determine from time to time how large a use is required. . . . So long as its uses of the land or its needs are not interfered with, no legal right to which it is entitled is violated, and it has no occasion to institute any proceedings at law or in equity to establish or vindicate such right. A respondent will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed."

Abandonment is not to be inferred from mere non-user, nor necessarily from the facts recited by the master as to fences put up on the location. It is clear that the master was justified in coming to the conclusion that there was no abandonment.

It follows that upon neither of the grounds thus urged by the defendants is the location shown to be invalid.

By the report it appears that various proceedings have taken place with reference to this land, but it is unnecessary to go through them in detail. It is enough to say that whatever rights were acquired, either by this location or otherwise, to the land situated south of the centre line of the location, being a strip two and one half rods wide, they were in the Boston and Albany Railroad Company in 1903, when the compromise of that year was made, and that the modification under that compromise did not lessen the width of the strip to less than twenty-eight feet.

The subsidiary facts not only justify the general findings, but seem to be inconsistent with any other result.

Decree affirmed.



CLARENCE W. STRATTON, administrator, vs. ATHOL SAVINGS BANK,
A. LOUIE TAFT, claimant.

Franklin. September 17, 1912. — October 16, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Gift. Donatio Causa Mortis. Assignment.

If a woman about to undergo a dangerous operation, which she believes that she will not survive, sends for an attorney at law, executes an order transferring to her stepson a deposit in a savings bank represented by a bank book, and hands the order with the bank book to the attorney to be sent to her stepson in case of her death or to be returned to her if she lives and calls for them, but it is understood both by the woman and the attorney that he is to hold the order and the bank book as her agent and not as the agent of the stepson, and if the woman dies soon after the operation, there has been no gift as a *donatio causa mortis* or by way of an assignment, there having been no delivery to the donee or to any one for him during the lifetime of the donor.

CONTRACT OR TORT by the administrator of the estate of Mary L. Taft against the Athol Savings Bank, for \$898.11 and interest, alleged to be the amount of a deposit which belonged to the plaintiff's intestate at the time of her death. Writ dated December 15, 1909.

Upon a petition of the defendant A. Louie Taft was summoned in as claimant and was made a party to the action.

The case was heard by *Crosby, J.*, without a jury. The facts found by the judge were as follows: Mary L. Taft of Northfield, a short time before November 11, 1907, went to Brattleboro, in the State of Vermont, and there entered a hospital for the purpose of undergoing a severe operation. On November 11, 1907, she sent for one Harold E. Whitney, an attorney at law in Brattleboro, who called at the hospital to see her. She informed him that she was to undergo a very severe operation and feared that she might not recover. She told him that she had some property that she wished to leave, handed him a bank book issued by the Athol Savings Bank and asked him to make out an order in favor of her stepson, A. Louie Taft of Ludlow, Vermont. Mr. Whitney made the order as requested and it was executed by Mrs. Taft. Mrs. Taft delivered the order and the bank book to Mr. Whitney with the following instruction: "You take the book and, in the event that you learn of my death, send it by mail to A. Louie Taft of Ludlow, and in the event that I live and call for it, return it to me." Mrs. Taft underwent the operation on November 11 and died on November 14. Mr. Whitney learned of her death shortly after it occurred and sent the order and bank book by mail to A. Louie Taft at Ludlow.

At the close of the evidence the claimant asked the judge "to rule upon all the evidence that the claimant is entitled to a finding that the bank book became his property upon the delivery thereof by said Whitney to him and that the delivery by Mrs. Taft to Whitney on the evidence, was a valid gift *causa mortis*."

The judge refused to make this ruling, and made the fourth ruling requested by the plaintiff, which was as follows: "That upon all the evidence the claimant cannot maintain his claim and the finding must be for the plaintiff."

The judge made the following findings and ruling: "I find that, at the time Mrs. Taft executed the order and delivered it and the bank book, she believed she was about to die and would not survive the operation. I further find that from the language used by Mrs. Taft it is plain that she did not intend that the order and bank book should be delivered to the donee Taft during her lifetime. Whitney held the order and bank book as her attorney

and representative during her lifetime and subject to her orders. I therefore find that there was no delivery to the donee, or to any one for him and so no title or possession passed to the donee during the lifetime of the donor. As there was no valid delivery of the order and bank book during the lifetime of Mrs. Taft, the property did not pass to the donee either as a gift *inter vivos* or *causa mortis*. Upon all the evidence in the case I rule as matter of law that no title to the deposit in question passed to the claimant, A. Louie Taft."

The judge found that the plaintiff was entitled to judgment for the amount of the deposit, less the sum of \$25 allowed to the bank as costs. The claimant alleged exceptions.

H. L. Skeels, of Vermont, (*W. A. Davenport* with him,) for the claimant.

F. L. Greene & J. J. Leary, for the plaintiff, were not called upon.

HAMMOND, J. The first contention of the claimant is that there was a *donatio mortis causa* of this bank book to him. In the case of a gift *mortis causa* as well as in that of a gift *inter vivos* a delivery to the donee, or to some one for him, during the lifetime of the donor is necessary to the validity of the gift. The gift "must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." Matthews, J., in *Basket v. Hassell*, 107 U. S. 602, 609. While the delivery may be made by the donor to some one for the donee, and in such case is good even although the thing given is not transmitted to the donee until after the death of the donor, still the delivery must be such as to transfer the title during the lifetime of the donor, a title defeasible, it is true, but complete in the donee until so defeated, the only difference in this

respect between a gift *inter vivos* and a gift *mortis causa* being that the former is indefeasible while the latter is defeasible. *Duryea v. Harvey*, 183 Mass. 429, and authorities therein cited.

Was there such a delivery? The judge before whom without a jury the case was tried has found that Mrs. Taft did not intend that the order and bank book should be delivered to the donee Taft during her lifetime, and further found that Whitney held both the order and bank book as her attorney and representative during her lifetime and subject to her orders; and that there was no delivery to the donee or to any one for him and that no title or possession passed to the donee during the lifetime of the donor. The finding that the order and book were held by Whitney subject to her order, when taken in connection with the finding that he held them as her attorney, must be taken to mean not that he held them subject only to the general right of revocation of a gift completed by delivery, but subject to every order which the donor might give him with reference to them as her own property. In other words she had not lost her control over it as the general owner.

The claimant insists that these findings are not warranted by the evidence. But this position seems untenable. The judge had the witnesses before him, and in view of the statements made by Whitney in the two letters written by him and of his testimony on cross-examination as to the conversation and as to those letters, he may have come to the conclusion that the statement made by Whitney in his direct examination as to the precise language used by Mrs. Taft was not in all respects accurate, that Whitney understood from the language actually used that he was to hold the order and book as her agent and not as the agent of the donee and that such also was the understanding of Mrs. Taft. Upon the whole evidence the question of delivery was one of fact, and the findings upon that part of the case must stand.

The second contention of the claimant is that there was a complete assignment of the book. But here, as elsewhere in the case, there was no completion by delivery. The written paper was still held by Whitney undelivered and under the full control of the assignor. There was no executed contract.

Upon the foregoing findings the court properly refused to rule as requested by the claimant, and rightly ruled, as requested by

the plaintiff, that the claimant could not prevail. The case differs materially from *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, cited by the defendant.

The exceptions as to the admission and rejection of evidence were not argued by the claimant, and in view of their nature we consider them waived.

Exceptions overruled.

CARRIE W. HOAG vs. CHARLES E. HOAG.

Hampden. September 23, 1912. — October 16, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Joint Tenants and Tenants in Common. Tenants by Entirety. Husband and Wife. Deed, Construction. Partition.

Under a deed of real estate to a husband and wife, described as such, made after St. 1885, c. 237, by the habendum clause of which the grantees are to hold the property "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own use and behoof forever," the grantees take not as simple joint tenants but as tenants by entirety. The interest of a husband and wife in real estate held by them as tenants by entirety cannot be severed, and a petition for the partition of such property will not lie.

PETITION for partition, filed in the Superior Court on December 18, 1911, praying for an order of sale of the real estate in question under the provisions of R. L. c. 184, § 47.

The respondent filed an answer in abatement, and also a general answer not waiving the answer in abatement, alleging in both that the petitioner and the respondent were husband and wife, annexing a copy of the deed of the real estate in question to the petitioner and the respondent, described therein as husband and wife, dated November 27, 1893, containing the habendum clause which is quoted in the opinion, and alleging that the petitioner and the respondent held the premises as tenants by entirety and that the premises could not be divided by partition.

The case was heard by *Pierce, J.*, upon the pleadings and the deed, of which a copy was annexed. He ruled that the petitioner

and the respondent held an estate by entirety in the premises described in the petition and that for that reason partition did not lie. The judge made an order that the petition be dismissed; and the petitioner alleged exceptions.

The case was submitted on briefs.

H. T. Richardson, for the petitioner.

D. E. Webster, for the respondent.

HAMMOND, J. The only question is whether under the deed from McKnight and Churchill the grantees, being then husband and wife, took an estate by entirety. If they did, then the petition should be dismissed; otherwise, there should be partition.

At common law, "if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands." 2 Bl. Com. 180. But where in a deed to two or more persons there was express language indicating that joint tenancy was not intended, then there was a tenancy in common. 2 Bl. Com. 193.

St. 1783, c. 52, being the first upon the subject, after reciting that "the principle of survivorship established by the rules of the common law, in cases where lands or other real estate are, or may be held in joint tenancy, has been found by experience to work great injustice in various instances," and that "the reasons upon which the said principle was originally founded, have long ceased to exist," declared (§ 4) that "the said principle of survivorship shall no longer be in force in this Commonwealth." But this act seems to have been subsequently regarded as a little too drastic, and it was repealed by St. 1785, c. 62, which restored the existence of joint tenancy, but provided in substance (§ 4) that all conveyances and devises of lands made to two or more persons shall be construed to create estates in common unless it be expressed therein that the grantees shall take a joint estate. And thus the law so far as now material continued until St. 1885, c. 237, hereinafter to be considered. Rev. Sts. c. 59, §§ 10, 11. Gen. Sts. c. 89, §§ 13, 14. Pub. Sts. c. 126, §§ 5, 6. It was early adjudged that the statute of 1785 did not include grants and devises to husband and wife; *Shaw v. Harsey*, 5 Mass. 521; nor, before foreclosure, mortgages given to secure a joint debt. *Appleton v. Boyd*, 7 Mass. 131.

By St. 1885, § 237, however, an amendment was made to Pub. Sts. c. 126, §§ 5, 6, by inserting in § 5 and by striking out in § 6 the words "or to husband and wife," so that these sections should read respectively as follows: (§ 5) "Conveyances and devises of lands made to two or more persons, or to husband and wife, shall be construed to create estates in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them." (§ 6) "The preceding section shall not apply to mortgages, nor to devises or conveyances made in trust, nor to a devise or conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy." The legal effect of the amendment was to include in the terms "conveyances" and "devises" those made to husband and wife. The law as thus amended has ever since continued. R. L. c. 134, § 6.

The deed under consideration was made in 1893, and therefore must be construed in the light of that statute so far as applicable. Did the grantees, being husband and wife, take an estate by entirety?

From the history of the legislation upon this subject, starting with St. 1785, c. 62, and ending in St. 1885, c. 237, it plainly appears that it was not the intention to abolish tenancy in common or joint tenancy, or tenancy by entirety, nor in any way to change the common law characteristics of either. Each remained as before, as a lawful mode of holding real estate. The simple purpose was to change the rules of construction of the language used in conveyances and devises of real estate. And the change was to be in the presumption arising out of such language. Whereas at common law the presumption (in the absence of an expression of a contrary intent) was that a joint tenancy was created, under the statute the presumption (in the absence of an expression of a contrary intent) was that a tenancy in common was created. In the law as to presumption, tenancy in common was substituted for joint tenancy. The distinction was made between a tenancy in common and a joint tenancy, and not between the usual form of joint tenancy existing between two or more persons and that form existing between husband and wife.

In the deed in question the grantees are described as husband

and wife. The grantors must be taken therefore to have known that this relation existed. They were making a deed to husband and wife and they knew it. The habendum is to the grantees "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own use and behoof forever." The language is almost exactly like that set forth in St. 1885, c. 237, and it plainly indicates that there is not to be an estate in common. Under the statute therefore no estate in common is created. The statute goes no further. It has performed its function. In going further and determining what kind of estate the grantees took, we can get no help from it, but must be guided by the common law principles of construction applicable to such matters. There can be no doubt that the language used in the habendum is such as would create a joint tenancy as between grantees other than husband and wife.

There is a conflict of authority as to whether husband and wife can hold lands granted to them jointly during coverture in simple joint tenancy as distinguished from an estate by entirety, although, partly on account of the disinclination in many of the States of the Union to favor the latter estate and partly on account of the various statutes changing the marital rights of women as respects property, the general weight of authority seems to favor the proposition that it is possible so to word a deed as to create such an estate in them. See for collections of the authorities the note to *Hardenbergh v. Hardenbergh*, 18 Amer. Dec. 371, 377, and 15 Am. & Eng. Encyc. of Law, (2d ed.) 846. But however that may be, one of the principal common law rules of construction upon this subject is that the same words of conveyance which would make other grantees joint tenants will make a husband and wife tenants by entirety. *Green v. King*, 2 W. Bl. 1211. Such is presumed to be the intention.

While it is sometimes said that an estate by entirety is not a simple joint tenancy (as indeed it is not), still the two very much resemble each other, the only practical difference being the inability of either spouse to sever the joint tenancy. And in this Commonwealth the former estate has been described as a species of the latter. Thus Field, J., in *Pray v. Stebbins*, 141 Mass. 219, 221, says: "This tenancy by entireties is essentially a joint tenancy, modified by the common law doctrine that husband and

wife are one person." See also *Pease v. Whitman*, 182 Mass. 363, 364; *Hayward v. Cain*, 110 Mass. 273, 279; *Wales v. Coffin*, 13 Allen, 213, 215. And in *Morris v. McCarty*, 158 Mass. 11, where in a deed given in 1886 the habendum was to the grantees "as tenants by the entirety and not as tenants in common," the grantees being supposed to be husband and wife but not such in fact, it was held that the grantees took as joint tenants. In that case the court said (p. 12): "An estate in entirety is an estate in joint tenancy, but with the limitation that during their joint lives neither the husband nor the wife can destroy the right of survivorship without the assent of the other. . . . The doctrine of survivorship is the distinguishing incident of title by joint tenancy."

We are of opinion that in the deed before us the grantees did not take as tenants in common but jointly as husband and wife, and that the nature of the estate taken, therefore, was not simply such a kind of joint estate as would have resulted if the grantees had not been husband and wife, but the kind of joint estate commonly taken by husband and wife; in other words that the grantees took not as simple joint tenants, but as tenants by entirety.

Petition dismissed.

CONNECTICUT VALLEY STREET RAILWAY COMPANY vs. CITY OF NORTHAMPTON.

Hampshire. September 17, 1912. — October 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Tax, Exemption, Street railway. Street Railway, Local taxation. Public Service Corporation. Statute, Construction. Words, "Rights of way."

The principle, that land taken by a public service corporation by right of eminent domain, or land which such a corporation having the right to take by eminent domain has purchased, is exempt from taxation so long as it is used for the public purpose for which it was authorized to be taken, does not apply to land purchased by a street railway corporation for the purposes of its railway under authority of a statute giving it the right to acquire such land by purchase or lease but not the right to take it by eminent domain.

St. 1909, c. 439, § 1, relating to the taxation of poles and wires, which amends

R. L. c. 12, § 23, as amended by St. 1902, c. 342, excepts from taxation in the cities or towns in which they are erected or laid poles, wires and pipes erected or laid by "street railway companies, the value of whose poles, underground conduits and pipes, together with the wires thereon or therein, for the purpose of taxation, shall, like their rails and rights of way, be included in, and not deducted from, the value of their corporate franchises." *Held*, that the amending statute like the statute amended relates only to the taxation of personal property, that the "rights of way" referred to are merely the rights subject to municipal regulation to lay and use tracks in streets already appropriated to the uses of public travel, and that the statute exempts from local taxation no real estate of a street railway company on which it maintains its tracks.

PETITION, filed in the Superior Court on November 6, 1911, under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of the city of Northampton to abate a tax assessed for the year 1911 on certain land and a portion of a bridge belonging to the petitioner upon which it maintained and operated its street railway.

The case was heard upon the pleadings and an agreed statement of facts by *Raymond, J.*, who found for the respondent and reported the case for determination by this court.

B. W. Warren, (*C. R. Lamson* with him,) for the petitioner.

J. W. Mason, (*R. H. Cook* with him,) for the respondent.

HAMMOND, J. This is a petition for the abatement of a tax laid by the assessors of the city of Northampton upon certain real estate owned in fee by the petitioner and situated within the territorial limits of the city. The property consists of a lot of land and such portion of a bridge connected therewith as lies within the city. The bridge crosses the Connecticut River, one end resting upon this land and the other upon land in the town of Hadley. The land is a strip twenty-two and a half feet in width, extending from the bridge to the highway. Upon the bridge and land the petitioner has constructed and maintains its rails, sleepers, poles, wires and appliances necessary for the operation of its street railway, and the sole use thereof is for such operation, the rails upon the land forming the connecting link between those on the bridge and those on the highway. The question is whether this real estate is subject to local taxation.

The petitioner is a duly organized domestic street railway corporation owning and operating a street railway over a route of which this real estate is a part. St. 1899, c. 293, authorized the petitioner under its then name of the Northampton and Amherst

Street Railway Company, to "construct . . . a bridge across the Connecticut River between the city of Northampton and the town of Hadley, at such a point as will enable it to connect its tracks on the locations granted or which may be hereafter granted to it by said city with the tracks on the locations granted or which may be hereafter granted to it by said town," and also to "construct and operate its railway on said bridge." And it was further authorized to "construct and operate its railway and electrical equipment in part upon such private land in the city of Northampton and in the towns of Hadley and Amherst as it may obtain by purchase or lease, subject to the approval and under the control of the board of aldermen of said city and the selectmen of said towns, respectively;" and further, to "acquire and hold, by purchase or lease, all real estate necessary . . . for the proper maintenance and operation of its railway." Under this authority the petitioner built the bridge, bought the land in fee and constructed its railway in part on each.

There can be no doubt that both bridge and land are real estate within the meaning of that term as used in our general tax laws (St. 1909, c. 490, Part I, § 3), and that in the absence of any law to the contrary they as such are subject to local taxation. The petitioner says, however, that there is a law to the contrary. It says that this property is exempt, first, because devoted to a public use; and second, because of the express language of St. 1909, c. 439, § 1.

1. It certainly is devoted to a public use. But is it for that reason alone exempt from local taxation? Generally speaking, property owned by the government, whether the ownership be in State, county, city or town, and exclusively used for public purposes, is presumed to be exempt from taxation. And this is so, even when the property is situated in another municipality within the State than the owner. Nothing but the clearly expressed will of the law-making power to the contrary will overcome this presumption. *Worcester County v. Worcester*, 116 Mass. 193. *Somerville v. Waltham*, 170 Mass. 160, and the cases therein respectively cited. It is to be noted, however, that the petitioner is not a governmental corporation. It is simply a private corporation doing business for profit; and hence this case is to be distinguished from those just cited.

The extent to which the real estate of a private corporation which is devoted to public use is exempt from taxation, and the reasons upon which this exemption is based, have been considered by this court in several cases, among which are *Salem Iron Factory v. Danvers*, 10 Mass. 514; *Worcester v. Western Railroad*, 4 Met. 564; *Worcester v. Board of Appeal in Tax Matters*, 184 Mass. 460; and *Milford Water Co. v. Hopkinton*, 192 Mass. 491. From these cases and the authorities therein respectively cited, it appears that in the early tax acts no mention is made of shares of corporation stock by name; that when first specially mentioned for taxation and for nearly a quarter of a century thereafter they were assessed according to their just value to the individual stockholders where domiciled; that, at least in some towns, the practice prevailed of assessing the property both real and personal of a corporation to it as the owner, thus subjecting some portion of the corporate property both real and personal to a kind of double taxation; that in *Salem Iron Factory v. Danvers*, *ubi supra*, it was adjudged that the personal property of a corporation was not assessable to it as owner, but that the real estate was so assessable in the place where situated; that with certain exceptions which, so far as material to this case, will be hereinafter noticed, this general system of the taxation of corporate property was continued until the passage of St. 1864, c. 208; that by that statute a change was made in the matter of taxation of certain corporations, the change consisting in relieving the stockholders from taxation and imposing upon the corporation a franchise tax depending upon the market value of all its shares less certain deductions among which is the value of the corporate estate subject to local taxation; and that such ever since has been a general feature of our system of taxation.

It further appears from these cases that early it was determined that certain real estate owned by public service corporations and exclusively devoted to public use was exempt from local taxation. The leading case upon this subject in our reports is *Worcester v. Western Railroad*, 4 Met. 564, in which it was held that the strip of land five rods wide which the defendant was authorized to take by right of eminent domain was, together with what was constructed upon or affixed to it, exempt from taxation as long as used for the public purpose for which the corporation was

chartered. It was further held that this was the limit of the exception. The rule as thus limited was approved in *Boston & Maine Railroad v. Cambridge*, 8 Cush. 237. See for other cases in which it has been applied, *Milford Water Co. v. Hopkinton*, 192 Mass. 491, and cases cited. Only such land is exempt as the corporation has taken by right of eminent domain, or, having the right so to take, has purchased. In other words this right of exemption from taxation is coextensive with the right to take by eminent domain. Because of difference in the statutes not much assistance is to be got from consideration of decisions in other States, but for cases adopting a similar rule see *Milwaukee & St. Paul Railway v. Milwaukee*, 34 Wis. 271; *State v. Hancock*, 4 Vroom, 315. See also Cooley on Taxation, (3d ed.) 367, and cases therein cited. This exemption is not founded upon any express language of the tax acts, but upon judicial construction of them as dictated by considerations of justice and expediency. The rule was declared sixty years ago, and, although the method of taxing real estate of a corporation has been changed in many respects, no change has been made in this respect as to real estate owned by railroad and street railway companies (at least up to the time of St. 1909, c. 439, hereinafter considered). The Legislature has been content with this interpretation of the tax acts. It is clear that the petitioner did not acquire title to the real estate in question by right of eminent domain, nor could it have so acquired it. This general principle of implied exemption upon which the petitioner relies is therefore not applicable; and the case so far as it rests upon that ground fails.

2. The petitioner, however, further contends that the property is expressly exempted from local taxation by St. 1909, c. 439, § 1, which so far as material reads as follows: "Tenth, Underground conduits, wires and pipes laid in public streets, and poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property, or in a railroad location by any corporation, except street railway companies, the value of whose poles, underground conduits and pipes, together with the wires thereon or therein, for the purpose of taxation, shall, like their rails and rights of way, be included in, and not deducted from, the value of their corporate franchises ascertained as provided by section one hundred and twenty-six of

Part III of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, and excepting also such poles, underground conduits, wires and pipes of a railroad corporation laid in the location of said railroad, shall be assessed to the owners thereof in the cities or towns in which they are laid or erected." Shortly stated, the contention of the petitioner on this branch of the case is that by the fair interpretation of the statute all rights of way of street railway corporations are exempt from local taxation, and that this bridge and land are included in that term.

In considering this statute it is well to look at the legislation leading to it, and also at the state of the law at the time it was passed as to the right of street railway companies to acquire rights of way and real estate.

Under the Revised Laws, the real estate and machinery of a corporation like the petitioner was subject to local taxation, and the value of such property was one of the items to be deducted from the market value of its shares in determining the "true value of its corporate franchise" upon which the excise tax was to be laid. R. L. c. 12, §§ 3, 15, 23, cl. 2; c. 14, §§ 37, 38. See also the previous statutes leading to these provisions, namely, St. 1837, c. 86; Gen. Sts. c. 11, §§ 8, 12, cl. 2; Sts. 1864, c. 208; 1865, c. 283; Pub. Sts. c. 11, §§ 12, 20, cl. 2; c. 13, §§ 38, 39, 40. No assessment was laid for other property either upon the corporation itself or its stockholders, but instead thereof there was a tax upon the corporate franchise. See *Middlesex Railroad v. Charlestown*, 8 Allen, 330. St. 1902, c. 342, amending R. L. c. 12, § 23, provided that "underground conduits, wires and pipes laid in public streets by any corporation, except street railway companies, shall be assessed to the owners thereof in the cities or towns in which they are laid." It will be noticed that it applied only to the conduits laid in public streets and that street railway companies were exempt from its provisions. After the statute, the real estate (except so far as exempt upon the first ground hereinbefore discussed) and the machinery of such corporations still remained subject to local taxation, and all the other property was still free from it. Such was the state of the law as to the taxation of the property of street railway companies at the time St. 1909, c. 439, was enacted.

What at that time was the law as to the acquisition of private land or rights of way therein by such companies? While from the first the right of taking land by right of eminent domain to the extent of five rods in width for the purpose of its charter seems to have been granted to a railroad company (see Sts. 1831, c. 72, § 1; 1833, c. 116, § 1; 1835, c. 148, § 3; Rev. Sts. c. 39, § 55), and while in several special charters of street railway companies (see for example Sts. 1860, c. 19, §§ 1, 13; 1861, c. 90, §§ 1, 16; c. 148, §§ 1, 14; 1892, c. 218, §§ 2, 3), a similar right has been granted, still the Legislature has been slow and cautious in granting by general laws any such right to the latter class of companies. The reasons are obvious. Such companies are chartered for the accommodation of "public travel in public ways," (see St. 1903, c. 476, § 1,) and they are expected to run the cars in the public streets, and only under exceptional circumstances are they expected to go elsewhere.

The first general statute upon this subject was St. 1898, c. 404, which authorized street railway companies to purchase or take by right of eminent domain under the conditions and in the manner therein prescribed, private land not exceeding five rods in width, "for the purpose of avoiding or eliminating a crossing of a railroad by its railway at grade." St. 1901, c. 503, while authorizing such companies to construct and maintain a part of their road upon land leased or purchased, gave no right to take land by right of eminent domain. St. 1903, c. 476, (re-enacted in St. 1906, c. 463, Part III, § 46,) however gave this right to take land to any such company "to enable it, in constructing its street railway or a branch or extension thereof, to avoid dangerous curves or grades existing in the highways, or for other similar purposes incident to and not inconsistent with its corporate franchise of operating a railway to accommodate public travel in public ways." Such was the law, so far as here material, as to the right of street railway companies to acquire land by lease, or purchase, or by right of eminent domain.

Under this condition of the laws as to the taxation of the real estate and machinery of street railway companies, and also as to their right to acquire land, St. 1909, c. 439, was passed. It is entitled "An Act relative to the taxation of poles for wires." It begins by saying that R. L. c. 12, § 23, as amended by St. 1902,

c. 342, § 1, shall be amended so as to read as thereafter described (as hereinbefore quoted). The changes as to underground conduits, etc., may be thus stated: Before this statute such property was subject to local taxation only when placed in or on public streets, and not even then when so placed by a street railway company. The statute having first extended the liability to such property placed on private land or on a railroad location by any corporation, proceeds to state clearly that so far as respects such property owned by street railway companies the law remains as before. In this connection it uses the following language: "... by any corporation, except street railway companies, the value of whose poles, underground conduits and pipes, together with the wires thereon or therein, for the purpose of taxation, shall, like their rails and rights of way, be included in, and not deducted from, the value of their corporate franchises."

The section of the Revised Laws (c. 12, § 23) to which this amendment applies deals exclusively with the taxation of personal estate. After laying down the general rule that all such estate shall be assessed to the owner in the place of his residence, it proceeds to state nine exceptions to this general rule. St. 1902, c. 342, simply amended the section by adding thereto a tenth exception which made underground conduits and the other articles therein specifically named subject to local taxation when laid in or erected upon public streets by any one other than street railway companies. St. 1909, c. 439, § 1, being the statute upon which the petitioner relies, still further amended this same section of the Revised Laws. It may be noted in passing that this last statute was not repealed by the general codifying law passed the same year. See St. 1909, c. 490, Part IV, § 27. In considering St. 1909, c. 439, § 1, it must be borne in mind that we are dealing with a statute amending a section of the Revised Laws which, as originally written and also as it stood after the amendment made by St. 1902, c. 342, provided only for the taxation of personal estate. It had no reference to the taxation of real estate. The most natural view of the statute, especially when the language of its title is considered, would be, in the absence of any express language calling for a different view, that the statute was dealing only with personal property. Moreover the use of the word "like" in the phrase "like their rails and rights of way" seems to

indicate that the phrase was used as an illustration of the law existing at that time as to rails and rights of way, rather than as an intention to change that law. One would hardly expect to find in a statute purporting to be an amendment to a general statute dealing only with personal estate a clause changing a well established system of taxation of real estate, especially when the clause is begun with the word "like" and not by "and" or "together with," or some such plain and clear words.

But the clause is in the statute and must be given its true meaning and effect. What is its meaning? Does it mean, as suggested by the petitioner, that before the statute the real estate of street railway companies over which their roads were constructed and maintained was free from local taxation? Or, again, does it mean, as also suggested by the petitioner, not to state the law as it stood at that time, but, whatever the law may have been, to have laid down a rule for the future, in substance that the rails and rights of way should be free from local taxation and that in the term "rights of way" is included the private land over which the road is maintained?

The first of these interpretations cannot be adopted because such was not the law; and, except at least upon clear and conclusive evidence, we cannot assume that the Legislature did not know what was the law created by its previous statutes, or that, knowing the law, it had inadvertently nodded. The difficulty as to the second interpretation is as to what is meant by "rights of way." What is meant by this term? To begin with, it is plain that it does not include the rails. The statute makes a distinction between rails and rights of way. They are two different classes of property. At the time of the enactment of the statute street railway companies, under the conditions respectively named in the statutes, might lay and maintain their rails (1) in public streets, (2) over private land the easement in which for that purpose could be acquired only by purchase or lease and had been so acquired, and (3) over private land taken by right of eminent domain or purchased when such right to take existed. Under certain circumstances a street railway company might with the permission of public authorities also construct and maintain its road upon land owned in fee by the company. But it is manifest that this right of a company to maintain its own road upon its

own land is not properly a right of way, as distinguished from the ownership in fee, or in other words is not an easement, but is simply one of the uses to which the owner as such may put his land. And this is so notwithstanding the fact that in order to make such use of the land owned by it the consent of certain public authorities must be first obtained. The object of such provisions in the case where the land is owned by the company is not to protect the landowner from an invasion of his property, but to see to it that the company duly preserves its character as a public carrier to accommodate the public travel in public ways.

There is a marked difference between the rights acquired by a street railway company by a location in a public street, being the first right above named, and that acquired by a location over private land, being the second and third rights above named. In the last two the right constitutes an easement in the real estate; and although it is technically only an easement, yet, speaking generally, it requires for its enjoyment a use of the land permanent in its nature and practically exclusive. *Hazen v. Boston & Maine Railroad*, 2 Gray, 574, 580. (See for the application of our system of taxation to such easements and the land which is subject to them, *Boston v. Boston & Albany Railroad*, 170 Mass. 95, and *Lancy v. Boston*, 186 Mass. 128.) Such an easement is an interest in real estate and is not personal estate.

The right acquired by a location in a public street is entirely different. It is no private interest in the land over which the street is located. The right granted is simply to lay down the rails and to run cars over them subject to change and even to revocation on the part of the public authorities. It is no new easement over the land. As said by Colt, J., in *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517, 518: "The franchise granted to a street railway corporation is not the grant of a right to appropriate without compensation an additional easement in the soil of the street. Nor can such use of the streets, under proper restrictions, be considered as the imposition of an additional servitude upon the land of the owner. The peculiar privilege is the right, not to acquire land, or an easement in land, but only the right, so long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel, for the purpose of facilitating such travel;

to modify the public use, and change, to some extent, the law of the road." In other words the company is permitted to be one of the travelling public in the public street, and to travel therein in the exercise not of any private right over the soil of the street; but simply as sharing in the public right. And it has no more easement in the street than the proprietor of a licensed omnibus or the owner of an automobile, or the ordinary pedestrian. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500. Such a right is not real estate nor any private right therein. So far as it is a property right at all it is simply personal property. Its value is peculiarly an item to be considered in the value of the corporate franchise upon which the excise tax is assessed.

And while there are many instances where street railway tracks are legally located and maintained on private land, still it nevertheless is true that the purpose for which street railway companies are chartered is to accommodate the public travel in public ways, that the right to construct and maintain tracks in private lands is merely incidental to this purpose, and in no way considerable as compared with the right to maintain tracks in the streets, that the right in the streets is simply personal estate, and moreover that this right is the one fundamental right upon which the street railway company must rely to transact the business for which it was chartered.

Rails are personal property and as such were not liable to local taxation at the time the statute was passed. *Middlesex Railroad v. Charlestown*, 8 Allen, 330. We have then a statute before us for interpretation which is intended as an amendment to a general statute which treats only of personal property. Every article specifically named in it is clearly personal estate except the "rights of way." If that term be interpreted to mean simply rights of way essential to and characteristic of the business of a street railway company, all is in harmony with the interpretation suggested by the apparent general scope of the act and by the setting in which the phrase "rights of way" is placed.

In view of the state of the law at the time of the enactment of the statute, of the apparent scope of the act as indicated by its title, of the phrase in question as indicated by its setting, and of the other considerations hereinbefore mentioned, we are of opinion

that by the term "rights of way" as here used is intended such rights of way as a street railway company has in the public streets and no other.

Petition dismissed.

GEORGE A. LAVARTUE vs. ELY LUMBER COMPANY.

Hampden. September 24, 1912. — October 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability.

In an action for personal injuries sustained while the plaintiff was in the employ of the defendant and was cutting boards into strips with a circular saw, there was evidence that the plaintiff had had no previous experience with a circular saw, that near the saw table was a pile of refuse higher than the table and that if the strips were sufficiently long they would be obstructed by the refuse and would twist and recoil, that the defendant's superintendent put the plaintiff at work without calling his attention to this condition, that he gave him no instruction in words, but, after putting through a few boards, told him to continue the work, that as the plaintiff was doing this the strips into which a board was being cut came against the refuse, and the plaintiff's hand was thrown upon the saw, causing the injuries sued for. There was no evidence that the pile of refuse was a permanent feature of the workshop. *Held*, that the questions whether the plaintiff assumed the risk of the injury and whether he was in the exercise of due care were for the jury, as was also the question whether the defendant's superintendent was negligent.

TORT for personal injuries sustained while the plaintiff was in the employ of the defendant and was at work sawing boards lengthwise into strips four inches wide with a circular saw. Writ dated August 18, 1911.

In the Superior Court the case was tried before *Hall, J.* The facts which could have been found upon the plaintiff's evidence are stated in the opinion. The plaintiff described the pile of refuse, mentioned in the opinion, as consisting of small pieces of wood and sawdust. He also described it as "a pile of sawdust, and perhaps shavings and boards, five or six inches higher than the level of the saw table." At the close of the plaintiff's evidence, the judge ordered a verdict for the defendant and reported the case for determination by this court, with a stipulation of the parties

that, if the case should have been submitted to the jury, judgment should be entered for the plaintiff in the sum of \$2,500; and that, if the ruling of the judge was correct, judgment should be entered for the defendant on the verdict. The report stated that no question on the pleadings was raised at the trial.

T. B. O'Donnell, (*T. J. Lynch* with him,) for the plaintiff.

W. Hamilton, for the defendant.

BRLEY, J. The jury would have been warranted in finding, that when the defendant's superintendent called the plaintiff from his ordinary labor and directed him to operate a circular saw, the plaintiff from want of previous experience was ignorant of the mode of operation; and that on the first day he worked about an hour and on the second day he was injured shortly after he began work. It was uncontroverted that near the end of the saw table a pile of refuse overtopped the table, and the jury could have found that if the strips were sufficiently long they would be obstructed by the refuse, which would cause them to twist or recoil. If this happened, the hand of the operator guiding the strips in front of the saw might be brought in contact with it. The superintendent did not direct the plaintiff's attention to this condition, or give him any verbal instructions, but, having on the first day passed one stick through, he gauged the saw on the second day, and, after passing through one stick and then three sticks which when sawed were to form one stick four inches in width, he ordered the plaintiff to continue the work. After sawing one set of sticks the plaintiff began upon the second set, when, as the plank or board passed the saw the strips came against the refuse, and, being forced above the plane of the table, their recoil threw or twisted his hand upon the saw. The burden of proof where it is contended that the employee assumed the risk rests upon the employer. *Leary v. William G. Webber Co.* 210 Mass. 68. At most the plaintiff assumed only obvious risks, and there is no evidence that the pile of refuse existed at the time of his employment, or constituted a permanent feature of the defendant's establishment. If it accumulated from the operation of the saw or other machines, and was removed occasionally, the plaintiff, even if in the exercise of ordinary care he should have seen it, could be found not to have understood that the strips might be obstructed or to have appreciated the effect upon his personal safety. *Fitzgerald v.*

Connecticut River Paper Co. 155 Mass. 155. *Mahoney v. Dore*, 155 Mass. 513. *Wagner v. Boston Elevated Railway*, 188 Mass. 437. *Jellow v. Fore River Ship Building Co.* 201 Mass. 464. *Griffin v. Joseph Ross Corp.* 204 Mass. 477. *Haley v. Lombard*, 207 Mass. 545. *Leary v. William G. Webber Co.* 210 Mass. 68. By reason of inexperience, and the brief period of employment before the accident, and his right to assume that under the order he would not be exposed to unnecessary peril, the question of the plaintiff's assumption of the risk or whether he was guilty of contributory negligence was for the jury. *Gomes v. New Bedford Cordage Co.* 187 Mass. 124. *Byrne v. Learnard*, 191 Mass. 269. *Reardon v. Byrne*, 195 Mass. 146, 149. *Boyd v. Taylor*, 195 Mass. 272. *Ruddy v. George F. Blake Manuf. Co.* 205 Mass. 172, 181.

It is contended by the defendant that there was no evidence of the superintendent's negligence. The need of instructions, however, was recognized or the process would not have been exemplified. The plaintiff, even if bound by his contract of employment to obey the order, had been placed in a position where he was unaware of the unsafe conditions arising from the proximity of the refuse, of which the superintendent knew or should have known. *Feeney v. York Manuf. Co.* 189 Mass. 336, 340. And having been entitled to such instructions as would have warned him of the danger, the jury were to determine whether the exemplifications and nothing more were sufficient. *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152, 155, 156. A failure under the circumstances to give sufficient instructions would warrant the jury in finding negligence of the superintendent under the statute. *Proulx v. J. W. Bishop Co.* 204 Mass. 130. The defendant moreover was required to provide and to maintain a reasonably safe place for the performance of the work, and this duty had not been discharged if the jury were convinced that the refuse prevented the strips, while the saw was being operated in the usual manner, from remaining at the same level with the table until the process had been completed. *Jarvis v. Cole Wrench Co.* 177 Mass. 170. *Silva v. Davis*, 191 Mass. 47. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 14. *Ruddy v. George F. Blake Manuf. Co.* 205 Mass. 172. The declaration, even if no question of pleading has been raised, is sufficient to support the action, and in accordance with the terms of the report a majority

of the court are of opinion that the verdict ordered for the defendant should be set aside, and judgment entered for the plaintiff in the sum of \$2,500.

So ordered.

COMMONWEALTH vs. WILLIAM RODZIEWICZ.

Worcester. September 30, 1912. — October 19, 1912.

Present: RUGG, C. J., LORING, BRALEY, & DECOURCY, JJ.

Evidence, Opinion: experts.

The rule, that a witness not an expert may be allowed to state a conclusion of fact at the time of his observation in regard to matters which are capable of being understood by men in general and which cannot be reproduced before the jury as they appeared to the witness, does not make admissible the conclusion of a witness as to the kind of fire that would produce the conditions that he observed when he examined a certain building.

At the trial of an indictment for wilfully and maliciously burning a building occupied in part by the defendant, an expert in the investigation of fires should not be allowed to testify to his opinion as to the kind of fire that would char an ordinary mop-board, sheathing and partition and burn holes in an ordinary wooden floor without any charring or burning between the different surfaces, this being a matter of ordinary experience or knowledge such as men in general understand and comprehend.

INDICTMENT, found and returned on May 15, 1912, for wilfully and maliciously burning a building, a part of which was occupied by the defendant.

At the trial in the Superior Court before *Hall, J.*, the Commonwealth called as a witness a member of the State police who in the course of his duty had had a large experience in investigating fires and had testified many times as an expert in fire cases. Against the objection and under the exception of the defendant he was allowed to testify that in his opinion based upon an investigation of the premises made on the day of the fire there had been six separate fires in the three rooms occupied by the defendant on the ground floor of the building. The witness then testified to his reasons for this conclusion. His reasons were in substance that he found at six different places that the mop-board or the sheathing or the partition or the floor had been charred or

burned without any charring or burning between, and that in one instance debris between, consisting of "coverings to oranges and stuff of that character that comes out of a store — paper," had not been burned and "was intact." He also testified that in four different places holes had been burned through the floor although the floor appeared to be in a damp condition; also that there was water under the floor which came within six or seven inches of the floor, and that the water was clear so that the ground under the floor could be seen, and that there was "no debris or anything" in it. After the witness had given this description of what he found to be the condition of the premises, against the defendant's objection and under his exception the prosecuting attorney was allowed to ask this question: "How do you draw any conclusion, Mr. Molt, from those holes in the floor, which you have described, as to the kind of fire which would produce that effect or would burn in that way?" and the witness was allowed to testify: "From what I saw there, the conditions underneath the floor, and the burning through, and small burning in this back room, something of a very intense nature must have been on these particular places to have set there and burned through this floor."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. W. Blake, for the defendant.

J. A. Stiles, District Attorney, & *E. T. Esty*, Assistant District Attorney, for the Commonwealth, submitted a brief.

LORING, J. The testimony of the witness as to the conclusions drawn by him from what he saw was not admissible as the conclusions made by an ordinary witness from observation of things which cannot be reproduced and therefore although involving opinion admitted *ex necessitate*, as to which see *Commonwealth v. Sturtivant*, 117 Mass. 122, 133; *Beverley v. Boston Elevated Railway*, 194 Mass. 450; *Partelow v. Newton & Boston Street Railway*, 196 Mass. 24; *Jenkins v. Weston*, 200 Mass. 488.

Doubtless there are cases where the effect of some kinds of fire upon some kinds of material substance is not a matter of ordinary experience or knowledge such as men in general understand and comprehend. But the kind of fire or fires which char ordinary mop-boards, sheathing and partitions and burn holes through an ordinary wooden floor without any charring or burning between

is not one of them. See in this connection *State v. Watson*, 65 Maine, 74; *Wood v. Chicago, Milwaukee & St. Paul Railway*, 40 Wis. 582; *Higgins v. Dewey*, 107 Mass. 494; *Lyman v. State Mutual Fire Ins. Co.* 14 Allen, 329; *Fireman's Ins. Co. v. J. H. Mohlman Co.* 33 C. C. A. 347; 91 Fed. Rep. 85.

The entry must be

Exceptions sustained.

DAVID SHAPIRO vs. BOSTON AND MAINE RAILROAD.

Worcester. September 30, 1912. — October 19, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Carrier, Of goods. Railroad. Agency.

In an action against a railroad corporation by the indorsee of a bill of lading of a car load of oats shipped from the State of Indiana for the loss of a part of the oats in transit, for which the plaintiff sought to hold the defendant liable as the last carrier, it appeared that there was written in the bill of lading after the word "Route" the name of a railroad corporation other than the defendant followed by a contraction of the word "Delivery" and that on the face of the bill of lading was stamped a provision that "charges at destination should be collected" at a rate named. There was evidence that the car in question was received by the defendant in the State of New York and was transported by the defendant to the city of its destination in this Commonwealth, that it there was placed by the defendant on a "circle track" from which it was taken by a switching engine of the railroad corporation named as above in the bill of lading to a freight yard of such other corporation, that the plaintiff was notified by the defendant that the car was in the freight yard of the other corporation, whereupon he went to the office of the defendant with his bill of lading and paid to the defendant all the transportation charges including the charge for shifting the car from the "circle track" to the freight yard of the other corporation, that the car then was unloaded by the plaintiff in such freight yard, and that the plaintiff had no communication with the other corporation. *Held*, that on this evidence it could be found that the defendant was not an intermediate carrier but itself as the last carrier delivered to the plaintiff the oats that remained in the car, having employed the other railroad corporation as its agent to haul the car to the freight yard of that corporation and having hired the use of the freight yard for the delivery of the oats.

LORING, J. This is an action for the loss of three hundred and six bushels from a car load of oats in transit between Kentland, Indiana, and Worcester, Massachusetts. The plaintiff as indorsee

of the bill of lading sought to charge the defendant on the ground that it was the last carrier and so liable under the rule of *Moore v. New York, New Haven, & Hartford Railroad*, 173 Mass. 335, and *Garvan v. New York Central & Hudson River Railroad*, 210 Mass. 275, where the earlier cases are collected. The presiding judge * directed a verdict for the defendant, and the case is here on an exception to that ruling.

In the words of the bill of lading, the oats were "Consigned to [the] order of *McCray Morrison & Co* Destination, *Worcester State of Mass* County of ——— Notify *D. Shapiro* At *Worcester State of Mass* County of ——— Route, *Boston & Albany Delav.*" Of the above words those in italics were written and the others were the printed words of the bill of lading blank. On the face of the bill of lading were stamped these words: "Charges at destination should be collected at 17 cents per 100 pounds."

The car in question was delivered by the Delaware and Hudson River Railroad Company to the defendant on its tracks in Mechanicsville in the State of New York, and was transported by the defendant over its tracks some one hundred and fifty miles to the city of Worcester. On its arrival there it was placed by the defendant on the "circle track." From a plan made part of the bill of exceptions it appears that this "circle track" connects the tracks of the defendant (which, coming from a northerly direction, end in the Union passenger station) with spur tracks of the Boston and Albany railroad which lie north of its main line tracks. The main line tracks of the Boston and Albany railroad, running east and west, pass through the Union Station. These spur tracks to the north of them diverge from the Boston and Albany main line tracks about half a mile east of the Union Station, and the freight yard tracks of the Boston and Albany railroad lying to the south of its main line tracks diverge from them at about the same place. From the "circle track" the car in question was taken by a Boston and Albany switch engine to the switch in the main line tracks about half a mile east of the station, then across the main line tracks and back on the south side of them to the Boston and Albany freight yard, opposite to and south of the Union Station. It must be taken on the bill of

* *Irwin, J.*

exceptions that the car here in question was unloaded by the plaintiff in the Boston and Albany freight yard. The loss of the three hundred and six bushels was discovered in the unloading. A crack was then found in the bottom of the car and there was evidence tending to show that the oats had dropped out through it.

Where, as in the case at bar, goods are transported to their destination by more than one carrier, the duty of an intermediate carrier is to transport the goods to the end of its line and there deliver them, with the accompanying way bill, to the next carrier. And it is the duty of the last carrier, on receiving the goods with a way bill showing (as in the case at bar) back charges to be due not to relinquish possession and so the lien to secure the back charges until they have been paid in full; and it is its duty, also, upon receiving payment of all charges, to deliver the goods to the consignee. The case at bar therefore resolves itself into these questions: (1) Were the jury bound as matter of law to find that the defendant railroad company acted as an intermediate carrier, that is to say, that it delivered the oats not lost in transit to the Boston and Albany railroad, to be delivered by it to the consignee on payment to it of all charges due for the transportation of them from Kentland, Indiana, to Worcester, Massachusetts, including a Boston and Albany delivery? Or on the other hand (2) were the jury warranted in finding that the defendant, after transporting the oats to the point of destination (the city of Worcester), delivered them itself to the consignee, in which case it used the Boston and Albany freight yard as its yard, and employed that company to haul the oats from the "circle track" to that yard as its (the defendant's) agent? It is stated in the bill of exceptions that "The plaintiff was notified that the car had arrived in Worcester and was in the Boston and Albany freight yard, whereupon he went to the office of the defendant company, with his bill of lading, and paid to the defendant company all the charges then due for the transportation of said car from Kentland to Worcester, including the shifting of said car from the circle track to the place in the Boston and Albany freight yard where it was unloaded. The amount of charge for such transfer of the car from said circle track to the Boston and Albany freight yard was adjusted between the defendant company and the Boston and Albany Railroad Company, and the plaintiff had nothing to do therewith."

Although it is not stated in the bill of exceptions that this notice (that the car was in the Boston and Albany freight yard) was given by the defendant, it is a fair if not the only inference from what is stated there that it was given by it; for on receiving this notice the consignee went not to the office of the Boston and Albany Railroad Company, but to the office of the defendant. And, as the bill of exceptions does not disclose any visit of the plaintiff to or communication by him with the Boston and Albany Railroad Company, the inference could be made that he received the oats under an order from the defendant consequent on his paying to it the charges due on them.

If these facts were found by the jury, the defendant did not deliver the oats to the Boston and Albany Railroad Company, to be delivered by it as the last carrier to the consignee, but did itself, as the last carrier, deliver them to the consignee, employing the Boston and Albany Railroad Company as its agent to haul the car to the Boston and Albany freight yard, and hiring the use of that yard as its yard for the delivery of these oats. The same conclusion was reached in *Western & Atlantic Railroad v. Exposition Cotton Mills*, 81 Ga. 522, a case similar to the case at bar. See also in this connection *Atlanta National Bank v. Southern Railway*, 106 Fed. Rep. 623. In the case of *Missouri Pacific Railway v. Wichita Wholesale Grocery Co.* 55 Kans. 525, relied on by the defendant, it was known that the loss occurred while the goods were in the possession of a railroad company which stood in the position in which the Boston and Albany stood in the case at bar. For that reason the question whether such a carrier is the last carrier within the rule of *Moore v. New York, New Haven, & Hartford Railroad*, *ubi supra*, did not arise.

Exceptions sustained.

R. B. Dodge, (S. G. Friedman with him,) for the plaintiff.

C. M. Thayer, for the defendant.

FANNIE F. TINKER vs. LENA BESSEL & another.

Berkshire. October 1, 1912. — November 11, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Deed. Spring. Adverse Use. Easement, By prescription, Abandonment.

In a deed conveying an acre of land and providing that the grantee "is to have with said acre a spring of water northeast of said land near an apple tree," the description of the spring is not void for uncertainty if when its language is applied to the surface of the earth it identifies a particular spring.

A deed, after describing an acre of land conveyed in fee, continued as follows: "The said [grantee] is to have with said acre a spring of water northeast of said land near an apple tree, with the right to bring it on to said premises." The spring was identified by the description. *Held*, that the deed conveyed in fee so much of the land out of which the spring issued as was necessary for the reasonable use of the spring as well as a right to the water.

In a suit in equity to restrain the defendant from interfering with the plaintiff's use of a certain spring surrounded by land of the defendant, it appeared that the defendant's predecessor in title conveyed the spring in fee to the plaintiff's predecessor in title, that at the time of the conveyance the grantor used the spring as the sole source of water supply for his house and that his successors in title, including the defendant, had used it continuously for more than thirty years and until the filing of the bill, but that the quantity of water thus used was much less than the capacity or normal flow of the spring. Nothing was done on the surface of the land in the vicinity of the spring to indicate that the defendant or his predecessors in title were occupying it adversely to the title conveyed to the plaintiff's predecessor in title. *Held*, that the prescriptive right to withdraw water from the spring acquired by the defendant and his predecessors in title was measured by the amount of water actually withdrawn, and that no title to the entire spring was acquired by them.

In a suit in equity to restrain the defendant from interfering with the plaintiff's use of a certain spring surrounded by land of the defendant, where it appeared that the plaintiff claimed title to the spring under a deed which conveyed in fee the spring and the land necessary for its use to the plaintiff's predecessor in title, the defendant contended that evidence that a predecessor in title of the plaintiff asked for and obtained from a predecessor in title of the defendant permission to connect a pipe with the spring showed that the right claimed by the plaintiff under the deed had been abandoned. *Held*, that, even if a title in fee such as the plaintiff acquired under the deed could be lost by non-user and abandonment, the question of abandonment was one of fact to be determined on all the evidence, and that the request to use the spring, if proved, was to be weighed with all the other circumstances.

RUGG, C. J. The plaintiff seeks to restrain the defendants from interfering with her use of a certain spring of water. The

plaintiff claims ownership of the spring as successor in title to Ira A. Brewer, to whom Gilbert D. Northrup, the defendants' predecessor in title, in 1851, being then owner of both estates, conveyed an acre of land by a deed which contained this language: "The said Brewer is to have with said acre a spring of water northeast of said land near an apple tree, with the right to bring it on to said premises." The case comes before us on appeal from a final decree * in favor of the plaintiff which presents exceptions to the master's report.

The defendants' first contention is that the description of the spring in the deed to Brewer is void for uncertainty. The description is sufficient if it identifies a particular spring when its language is applied to the surface of the earth by one acquainted with the physical features of the neighborhood. There was some conflicting evidence respecting another spring near the one in controversy. The master may have disbelieved so much of the testimony as tended to show that there was another spring. The weight of that which is reported seems against the existence of another spring in any proper sense. But however that may be, without reviewing the evidence in detail, there is no reason for setting aside his definite finding that the spring now in question was the one described in the deed of 1851, nor for reaching the opposite conclusion.

The defendants earnestly contend that the evidence shows conclusively that they have title by adverse use to the fee of the entire spring. The Northrup deed of the "spring of water" conveyed a fee in so much of the land out of which the spring issued as was necessary for the reasonable use of the spring itself, as well as a right to the water. *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 484. *Johnson v. Rayner*, 6 Gray, 107. *Owen v. Field*, 102 Mass. 90, 102. *Davis v. Spaulding*, 157 Mass. 431, 435. When the deed was given in 1851 Northrup, the grantor, used the spring as the sole source of water supply to his house, and his successors in title, including the defendants, have used it continuously since then. The quantity thus used is much less than the capacity or normal flow of the spring. Prescriptive title undoubtedly has been established thus to continue to withdraw water to a like extent in the future. *Peck v. Clark*,

* Made by Foz, J. The master was Walter F. Hawkins, Esquire.

142 Mass. 436, 441. The question is whether the further contention, argued in behalf of the defendants, is sound, that as the spring was on their land and they used all the land as they chose and drew all the water they needed from it, and the owner made no attempt to assert his right to it for more than thirty years, they have done all they could do in reason to obtain a complete title to the whole spring by adverse possession, and therefore have acquired such a title. It is the general rule that "prescriptive rights are measured by the extent of the actual adverse use of the servient property." *Middlesex Co. v. Lowell*, 149 Mass. 509, 511. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 449. *Proprietors of Kennebeck Purchase v. Springer*, 4 Mass. 416. The same rule applies to rights acquired by adverse possession. This rule may have resulted from several considerations. Title by prescription or adverse possession rests upon the fiction of a lost grant. The definite description, which would be necessary for a valid grant, must be supplied from evidence of actual use. It must be explicit and not left to inference or implication. Moreover, the establishment of such titles is matter of convenience, and has arisen because public policy requires that long continued possession ought not to be disturbed. *Coolidge v. Learned*, 8 Pick. 504, 508. But it is contrary to record titles, and begins in disseisin, which ordinarily is wrongful. The acts of the wrongdoer are to be construed strictly and "the true owner is not to be barred of his right except upon clear proof." *Cook v. Babcock*, 11 Cush. 206, 210. An adverse use must be under such circumstances of notoriety that the person against whom it is being exercised may be enabled to know about it and resist, if so inclined, the acquisition of the right before the period of limitation has run. The extent of openness and notoriety necessary for the acquirement of title by adverse use varies with the character of the land. *Allen v. Holton*, 20 Pick. 458, 465. *Coburn v. Hollis*, 3 Met. 125. *Parker v. Parker*, 1 Allen, 245. *Richmond Iron Works v. Wadhams*, 142 Mass. 569. There is reason for applying the rule with some strictness to property like the fee of a spring of water surrounded by land of another, where the title by adverse user is rested upon withdrawal of a fraction of the yield of the spring by a subterranean pipe and occupation of surrounding land under another and an admitted title. The opportunity of the real owner to ob-

serve an interference with his title is small in such case. So far as appears, nothing was done on the surface of the land in the vicinity of the spring to indicate that the defendants or their predecessors in title were occupying it adversely to the grant from Northrup to Brewer. Title by adverse possession under such circumstances ought not to extend beyond the limits of real occupation. The amount of water actually withdrawn from the spring measures the title acquired. The conclusion from all these considerations is that the defendants fail to show title to the entire spring by adverse use.

It has been urged that the evidence shows that a predecessor in title of the plaintiff asked and received permission from the owner of the servient estate to connect a pipe with the spring box, and that hence an abandonment should have been found. This evidence was not decisive. *Warshauer v. Randall*, 109 Mass. 586. *King v. Murphy*, 140 Mass. 254. It was to be weighed with all the other circumstances. Commonly the question whether there has been an abandonment is one of fact. *Willets v. Langhaar*, 212 Mass. 573, and cases there cited. Speaking accurately, non-user and abandonment apply only to an easement, and not to a fee such as was conveyed by the deed here in question. It cannot be said that the finding of the master in this respect was wrong.

The defendants offered in evidence an assignment of dower made by commissioners in 1853 to the widow of Gilbert D. Northrup, in which was this paragraph, "Also reserving the right of a spring of water now carried to the dwelling house of the said deceased, and also of another spring of water contracted for by Alonzo Brewer." We do not perceive any error in the exclusion of this report. It does not relate to the spring of Ira A. Brewer. It does not tend to show any larger use of the spring than admittedly has been acquired by prescription by the defendants and their predecessors in title.

Decree affirmed with costs.

C. H. Wright, for the defendants.

C. E. Hibbard, for the plaintiff.

MARY CHANNELL vs. JUDGE OF CENTRAL DISTRICT COURT OF
NORTHERN ESSEX & another.

Essex. November 7, 1912. — November 11, 1912.

Present: RUGG, C. J., BRALEY, SHELDON & DECOURCY, JJ.

Practice, Civil, Appeal. Supreme Judicial Court. Mandamus.

No appeal lies from a decree made by a single justice of this court in a proceeding at law. The remedy is by exceptions unless the justice reports the questions raised.

The function of a writ of mandamus directed to a lower court is to compel judicial action by such court and not to direct what that action shall be.

A petition by a married woman for a writ of mandamus directed to a judge of a district court to compel him to issue a complaint against the husband of the petitioner for non-support will not be granted, where it appears that such judge within a period of less than three months had given two hearings upon the petitioner's complaint against her husband for non-support and had rendered decisions thereon, and had refused to receive another complaint from the petitioner unless some additional fact was presented by her, and it does not appear that any additional fact was presented.

RUGG, C. J. This is a petition for a writ of mandamus. At the hearing before the single justice,* the petition was dismissed. From this decree the petitioner has appealed. The statute does not allow an appeal from a decision of a justice of this court in a proceeding at law, that procedure being confined to decisions of the Superior Court. R. L. c. 173, § 96 as amended by St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4. *Cowley v. Train*, 124 Mass. 226. *Attorney General v. Oliver*, 175 Mass. 163. *Brockton v. County Commissioners*, 183 Mass. 42. *Norton v. Lilley*, 210 Mass. 214, 218. The only way to bring before the full court for review any decision of a single justice of this court in an action at law is by exceptions, unless he reports the questions raised.

If the matter be treated as properly before us, no error of law appears upon the face of the papers. The function of a writ of mandamus directed to a lower court is to compel it to exercise its judicial functions, not to direct what action shall be taken. *Crocker v. Justices of the Superior Court*, 208 Mass. 162. The

* *Braley, J.*

averments of the answers in substance are that there have been two hearings within a period of less than three months by the judge of the district court upon the petitioner's complaint against her husband for non-support, and a decision had thereon, and a refusal to receive another complaint from the petitioner unless some additional fact is presented by her.

If the single justice found these averments to be true, no writ of mandamus could issue.

Appeal dismissed without costs.

M. Channell, pro se.

No counsel appeared for the respondents.

J. SIDNEY FOSTER vs. THOMAS P. CURTIS.

Suffolk. March 15, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON,
& DECOURCY, JJ.

Negligence, In use of highway, Violation of statute. Law of the Road.

The provision of R. L. c. 54, § 2, that "the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way," applies to the driver of an automobile who is attempting to pass a street railway car travelling in the same direction. RUGG, C. J., HAMMOND, & LORING, JJ., dissenting.

In an action for personal injuries sustained, when the plaintiff had alighted from the right hand side of an open electric car of a street railway, from being struck by an automobile driven by the defendant, if it appears that the street railway car, which had come to a stop, was proceeding in the same direction in which the defendant was travelling and that the defendant attempted to pass to the right of it, the defendant's violation of R. L. c. 54, § 2, is evidence of negligence on his part. RUGG, C. J., HAMMOND, & LORING, JJ., dissenting.

TORT for personal injuries sustained by the plaintiff on September 19, 1906, from being struck by an automobile driven by the defendant on Broadway in the town of Revere. Writ dated January 25, 1908.

The answer was a general denial.

In the Superior Court the case was tried before *Harris, J.* The plaintiff testified that he was struck by the defendant's

automobile immediately after he had alighted from an open electric street railway car, that at the point where the accident happened Broadway was forty feet wide with double street railway tracks, over which cars were passing frequently, and that the distance on each side of the street between the outer rail of the street railway tracks and the curbstone was about twelve feet. The defendant testified that before the accident he had been following for several blocks the street railway car from which the plaintiff alighted, going at the same rate of speed as the car, that as the car began to go more slowly in approaching the crossing the defendant did the same until the car came within about fifty feet of the crossing, when the defendant turned to the right and went out to the curbstone, so as to leave a space between the street railway car and his automobile, that the street railway car then stopped and the defendant was about to pass it on the right, when the plaintiff stepped off the car and was struck by the mud guard and the front wheel of the defendant's automobile.

At the close of the evidence the plaintiff asked the judge to give to the jury, among other instructions, the following:

"The fact that the defendant was disobeying the law of the road will justify the jury in finding for the plaintiff, if the plaintiff was in the exercise of due care."

The judge refused to give this instruction, and with reference to the subject matter of the request instructed the jury as follows:

"Now, in regard to the side of the road that the defendant was travelling upon. While it is the general 'law of the road' as we call it, that one vehicle coming up behind another and trying to pass it shall pass it on the left, I do not understand that the rule applies to electric street cars in the highway, where there are two sets of tracks. The reason that I make that distinction as I understand it (although I am not aware that the case has been squarely decided in this Commonwealth), is this. If I am driving with a horse and carriage upon a road and I come up behind another man driving a horse and carriage and I want to go by him, I go by on his left; because, if he, travelling in that direction, meets a team coming in the other direction and has to turn out, by the 'law of the road' and by natural conduct he turns to the right. So that if we try to go by him on his right from behind and he were at the same time forced to turn out for something

coming toward him, he would turn right into us. That is to say, we would not leave him free to turn; but in the case of electric cars, which run upon rails and cannot turn out, but can only stop, go forward or backward, it seems plain enough to me, and for the purpose of this case I instruct you as a matter of law, that the ordinary rule of the road for vehicles which have the full liberty of the width of the road does not apply. They cannot turn out. But on the other hand, the defendant, if he had undertaken to go to the left of the car preceding him, would have had necessarily to turn onto the track where the cars that were coming toward him might come into him head-on. So that, so far as his being on the right hand side of the road itself goes, I should instruct you — I do instruct you — that that was not a violation of the 'law of the road,' and was not of itself negligence."

The plaintiff excepted to the refusal to give the instruction requested and to the instruction given.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which, after the resignation of *Harris, J.*, were allowed by *Jenney, J.*

The case was argued at the bar in March, 1912, before *Rugg, C. J.*, *Braley, Sheldon, & DeCourcy, JJ.*, and afterwards was submitted on briefs to all the justices.

S. R. Cutler, for the plaintiff.

W. H. Hitchcock, for the defendant.

BRALEY, J. The scene of the accident was a public way in the centre of which the double tracks of a street railway were so located as to leave an equal space between the outer rails and the opposite curb. The plaintiff had just alighted from the right hand side of an open electric car, and while in the act of stepping forward to cross the street to the curb in front, the defendant's automobile, which had been following in the rear, turned to the right to pass the car and in passing struck and injured him. If the defendant had gone by on the left the plaintiff would not have been injured, and in submitting to the jury the question of the defendant's negligence the presiding judge was requested by the plaintiff to rule that "the fact that the defendant was disobeying the law of the road will justify the jury in finding for the plaintiff, if the plaintiff was in the exercise of due care."

Damon v. Scituate, 119 Mass. 66, 68. *Finnegan v. Winslow*

Skate Manuf. Co. 189 Mass. 580, 582. The verdict having been for the defendant, the exceptions are to the refusal to give this request, and to the instructions that the defendant's conduct "was not a violation of the 'law of the road,' and was not of itself negligence." A majority of the court are of opinion that the request was appropriate, and that the instructions were erroneous.

By R. L. c. 54, § 2, "The driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way; and if it is of sufficient width for the two vehicles to pass, the driver of the leading one shall not wilfully obstruct the other." It has been decided that in the concurrent use of our public ways an automobile is to be classed as a vehicle. *Hennessey v. Taylor*, 189 Mass. 583. *Trombley v. Stevens-Duryea Co.* 206 Mass. 516. *Lynch v. Fisk Rubber Co.* 209 Mass. 16. *Bourne v. Whitman*, 209 Mass. 155. But the defendant contends that an electric street car should not thus be defined, and, if it is not a vehicle as an object of travel, his liability at common law depended upon whether he acted with reasonable prudence in passing upon the right instead of on the left, and the jury correctly settled this issue in his favor. *Smith v. Conway*, 121 Mass. 216, 219.

It was assumed in *Clinton v. Revere*, 195 Mass. 151, 154, where the plaintiff riding a bicycle and following an electric car and furniture wagon moving abreast, turned to the right to pass between the car and the wagon and was injured by a defect in the way, that his failure "to observe the requirements of R. L. c. 54, § 2, by turning and passing by to the left of the car," was not decisive, as the jury were to determine whether he acted with ordinary care. And in *McGourty v. DeMarco*, 200 Mass. 57, 60, where the plaintiff in alighting from a street car was run into from behind by a team owned by the defendant and driven by his son, it was said: "If the defendant was, as his counsel assumed in their brief, and as the jury certainly might find, attempting to pass the car from behind on his right hand in violation of R. L. c. 54, § 2, the jury might find that this, under the circumstances, was negligence on the driver's part such as McGourty was not called upon to anticipate." See also *Keeney v. Springfield Street Railway*, 210 Mass. 44, 48.

A further examination of the statute in the light of our de-

cisions confirms this construction. The relative rights of the general public to use the highway through which a street railway runs were defined some fifty years ago by Chief Justice Shaw in *Commonwealth v. Temple*, 14 Gray, 69, 75, as being equal "in the absence of any special regulation by law." In construing the St. of 1856, c. 302, § 5, which made the wilful and malicious obstruction of the use of the track of the street railway of the company incorporated by the statute a criminal offense, he further says, in considering the exceptions of the defendant who had been convicted of a violation of the act by obstructing a horse car when travelling over the street with a heavily loaded team: "The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the car came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off. Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public, by the grant of the franchise, had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move, and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon therefore was for the time being an unnecessary obstruction of the public travel, and therefore unlawful." While the motive power has been changed, no departure has been made from the principles of this decision, which have been affirmed whenever in the concurrent use of our public ways by other travellers and street cars it has been necessary to refer to their respective rights. *Driscoll v. West End Street Railway*, 159 Mass. 142, 146. *Benjamin v. Holyoke Street Railway*, 160 Mass. 3, 5. *O'Brien v. Blue Hill Street Railway*, 186 Mass. 446, 447. *Kerr v. Boston Elevated Railway*, 188 Mass. 434, 435, 436. *Callahan v. Boston Elevated Railway*, 205 Mass. 422, 423.

A vehicle is a means of conveyance, and the term has not been restricted to horse drawn carriages, but includes bicycles, motor cycles, automobiles, or a street car, which since the leading case is assumed to be a vehicle having no paramount right, when being operated, to inconvenience other travellers except in so far as the Legislature has granted an exception to street railway companies. Said Holmes, J., in *White v. Worcester Consolidated Street Railway*, 167 Mass. 43, 44, 45, "Their tracks are in the highway, where all vehicles have a right, not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them, but subject to that and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith v. West End Street Railway*, 165 Mass. 572, 580. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track." *O'Brien v. Blue Hill Street Railway*, 186 Mass. 446. *Williamson v. Old Colony Street Railway*, 191 Mass. 144. *Stubbs v. Boston & Northern Street Railway*, 193 Mass. 513. *Chaput v. Haverhill, Georgetown & Danvers Street Railway*, 194 Mass. 218. *Jeddey v. Boston & Northern Street Railway*, 198 Mass. 232. *Lockwood v. Boston Elevated Railway*, 200 Mass. 537. *Eldredge v. Boston Elevated Railway*, 203 Mass. 582. *O'Brien v. Lexington & Boston Street Railway*, 205 Mass. 182. *Hatch v. Boston & Northern Street Railway*, 205 Mass. 410. *Carroll v. Boston Elevated Railway*, 205 Mass. 429, 430. *Eustis v. Boston Elevated Railway*, 206 Mass. 143. See also *Burton v. Nicholson*, [1909] 1 K. B. 397, where the court held that the driver of a carriage overtaking a tramcar must observe the law of the road.

The right of the plaintiff as a pedestrian to free and unobstructed passage also has not been abridged by modern conditions of travel. "There is no law or principle of law, or of reason, which confines foot-passengers to particular crossings. Such a restriction would be very inconvenient and annoying. The street should be kept in such condition, that foot-passengers may be able to cross, with a reasonable degree of safety, using proper care themselves, at any and all places. The necessity of this might be illustrated

very fully by reference to the common and ordinary course of business. A person, who is left by an omnibus in the middle of the street, should be able to go in safety to the sidewalk, at the nearest point, and not be compelled to make his way among the carriages in the middle of the street, till he can reach a place particularly set apart and designated for the purpose of crossing." Fletcher, J., in *Raymond v. Lowell*, 6 Cush. 524, 530, 531. *Slayton v. West End Street Railway*, 174 Mass. 55. *Eustis v. Boston Elevated Railway*, 206 Mass. 143, 144. *Mullen v. Boston Elevated Railway*, 209 Mass. 79, 80, and cases cited. *Berry v. Newton & Boston Street Railway*, 209 Mass. 100. The statute in question has not provided merely for the protection of travellers in vehicles; pedestrians also are entitled to rely upon the presumption that it will be observed. *Brown v. Thayer*, 212 Mass. 392. It should receive a construction not only in harmony with what has been declared to be the reciprocal rights and duties of travellers as defined by the authorities cited, but which will not create an exception where none is necessary to effectuate the legislative intention.

The law of the road first appears in the St. of 1820, c. 65. It was not, however, until the Gen. Sts. c. 77, that § 2 (now R. L. c. 54, § 2) was enacted, and § 5, that "the provisions of this chapter shall not apply to horse railroads" was also added. Re-enactment followed in the Pub. Sts. c. 93. In the last revision § 5 is omitted. The reason given by the commissioners is that it is superfluous, as "The history and subject matter of this chapter show that it has no application to railways, whether operated by animal power or by electricity." Commissioners' Report on Pub. Sts. c. 54, note. If the acceptance and adoption of the report without change are decisive that no express repeal of the existing law was intended, yet the Legislature must be understood to have acted under the well recognized rule that, if a statute which previously has received judicial construction is codified with the purpose of not making any substantial change in the law, it will be presumed that the intention was to adopt the construction given by this court even if there may be changes in phraseology. R. L. c. 226, § 2. *Commonwealth v. Lancaster Mills*, 212 Mass. 315. *Paszkowski v. Stony Brook Paper Co.* 210 Mass. 86. *Wright v. Dressel*, 140 Mass. 147, 149. *Bent v. Hubbardston*, 138 Mass. 99, 100. *Shelton v. Sears*, 187 Mass. 455.

If therefore § 5 of c. 93 of the Pub. Sts., being merely declaratory of the law of the road as defined by this court, is to be treated as still in force, how far does it affect the preceding sections of the R. L. c. 54? The first two sections are commands addressed to the drivers of carriages and other vehicles on a road or bridge. By § 1 every such driver is required to drive his vehicle seasonably "to the right of the middle of the travelled part of such bridge or way," and by § 2, if passing a vehicle going in the same direction he is required to "drive to the left of the middle of the travelled part." Where vehicles are moving in the same direction over a roadway sufficiently wide for them to pass abreast, the statute is silent as to any duty of the vehicle ahead, except that "the driver of the leading one shall not wilfully obstruct the other." The comprehensive words of these sections should be given their ordinary and natural significance. R. L. c. 8, § 4, cl. 3. Although street cars are vehicles within the meaning of the statute, their drivers are relieved from the requirement of turning to either side of the middle of the travelled part of the road. The reason is obvious. The cars need not turn, because they cannot diverge from the tracks on which they run. Persons lawfully using a public way have a right to presume that drivers of free teams and vehicles will act in conformity with these directions, and if a driver neglects to obey them, and injury results, this is a circumstance which the jury may consider in determining whether he was careless, and unless explained it is indicative of his negligence. Besides, if the exemption applicable to street cars were held to include the defendant, the practical results would be serious. Street railways are not chartered and granted locations in our public ways for the benefit of the promoters or owners. "The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit, for which these special modes of using the highway are granted, and not the profit of the proprietors." *Commonwealth v. Temple*, 14 Gray, 69, 76. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517, 518. *Pierce v. Drew*, 136 Mass. 75, 81. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 503.

It is common knowledge that passengers generally leave street cars from the right hand side, whether the cars run on single or double tracks, which in cities and large villages usually are located

in the centre of thoroughfares where travel is most frequent. And if the drivers of other vehicles are required to observe a street car as being within the law of the road, passengers in alighting will be freed from the needless hazard of personal injuries from the undue proximity of vehicles passing in either direction. The not infrequent condition requiring a prudent driver, if the tracks are double, to ascertain whether a car is approaching on the parallel track before turning his vehicle upon it, is but incidental to ordinary travel in streets in which cars are being operated. If an oncoming team were moving over the same area, he would be required to use similar precautions to avoid a collision, or even if necessary, to wait for it to pass. It may be suggested that in some country roads and village streets, or perhaps in cities, tracks are located at the extreme edge of the highway, where of necessity passengers alight from the left hand side, and the inconvenience of drivers of vehicles who wish to pass may be increased, and the safety of pedestrians correspondingly imperilled. The requirement, however, is only that the passing vehicle shall "drive to the left of the middle of the travelled part" of the way, and, as we have pointed out, where the jury find the circumstances to be such that in the exercise of reasonable care the statute could not be literally obeyed, no inference of negligence can be drawn.

If under modern conditions of travel in our congested streets there is danger in requiring the driver of a carriage or other vehicle passing another carriage or vehicle travelling in the same direction to "drive to the left of the middle of the travelled part of a bridge or way," as is intimated in the dissenting opinion, yet we cannot disregard the express requirement of the statute; it is for the Legislature to provide a remedy.

Exceptions sustained.

The CHIEF JUSTICE and Justices HAMMOND and LORING express their dissent from the opinion of the majority of the court by reason of their belief in the evil consequences to the public travelling upon highways in trolley cars and other vehicles and on foot which will arise from it. The only question involved is whether, under R. L. c. 54, § 2, the driver of a motor or horse drawn vehicle overtaking and passing an electric car going in the same direction must leave it on his right or on his left. That

question has never been decided by this court. In *Burton v. Nicholson*, [1909] 1 K. B. 397, the law under consideration was different in its language and history from our statute, and the court there felt compelled to hold that other vehicles passing tramcars must observe as to them the law of the road, although recognizing that so construed it was almost impossible "to be obeyed in a reasonable manner in practice." Within less than four months after that decision the order was annulled by the legislative body. See Statutory Rules and Orders for 1909, p. 497.

A penal statute ought not to be interpreted so that it cannot be reasonably obeyed, or so that it will require further legislation to make it workable, unless no other course is open. We think it is plain that it was not the intent of the Legislature to include electric cars or horse cars within the law of the road, and for these reasons:

1. It is shown by the history of the statute. The first statute as to the use of the road by travellers in carriages and other vehicles was St. 1820, c. 65. This act contained regulations as to travellers meeting upon the highway, but none as to travellers going in the same direction passing one another. It was embodied in substance in Rev. Sts. c. 51, without change. When the General Statutes were enacted § 2, now under consideration, appeared for the first time, and another section, numbered 5, was added stating expressly that the provisions of the chapter should not apply to horse railroads. Gen. Sts. c. 77. The reason for this undoubtedly was that the first statutes authorizing the construction of horse railroads were passed in 1853, and a considerable number had been passed before 1860. Gen. Sts. c. 77 appears substantially without change in Pub. Sts. c. 93. The commissioners for consolidating and arranging the Public Statutes, in their report of 1901, append to c. 54 a note to the effect that they have omitted § 5 "as superfluous. The history and subject matter of this chapter show that it has no application to railways, whether operated by animal power or by electricity." The law of the road as reported by the commissioners was adopted without change by the Legislature, which means that the report and note were approved. Hence the purpose of the Legislature in omitting from the law of the road in the Revised Laws the express exemption of horse cars and by necessary implication of

electric cars, which had been in the two immediately preceding compilations of the statute law, was not to change in any respect the law as it had been for more than forty years. The primary significance of the exemption of horse railroads in Gen. Sts. c. 77, and in Pub. Sts. c. 93, is that the drivers of the cars of horse and electric railways are not bound to observe the law of the road. An equally necessary conclusion, however, is that such cars are not to be regarded as carriages or vehicles by other travellers. To say that the statute "shall not apply to" such cars is equivalent to saying that they are not "carriages" or "other vehicles" within the meaning of those words in the statute. They are exempted from the section touching the passing of one carriage or vehicle by another going in the same direction as much as from the section concerning those which meet going in opposite directions. They are excepted out of the statutory provisions both as objects and subjects of travel.

2. There are in the Commonwealth many miles of electric railways constructed upon the side of highways. It is impossible to treat the law of the road as applicable to cars upon tracks so laid. The Legislature cannot have intended to make the law of the road applicable in case of cars when it is impossible to obey it in these not infrequent instances where tracks are laid on the side of public ways.

3. The travelling public almost universally, according to our observation, has construed the statute in practice as not applying to street cars. When a statute regulating the daily conduct of thousands of people has received an interpretation by substantially universal custom, it ought not to be set aside unless strongly required.

4. The public construction of the meaning of the statute secures a far larger degree of safety than any other interpretation. There is no danger to any traveller in the careful passing by any vehicle to the right of an electric car going in the same direction, while there is or may be great peril in passing to the left, from behind the obstruction to sight and hearing, which an electric car usually is, into the face of other traffic. The passenger alighting from the street car, either on the right or left side, is protected by the general requirement of due care from other travellers.

5. It is well nigh impossible to obey the statute interpreted

in any other way. Heavily loaded vehicles on congested streets must be almost constantly violating the law, see *Bryant v. Boston Elevated Railway*, 212 Mass. 62, or else cause great and unnecessary congestion of traffic. Many car tracks are laid in the centre of roads where there is not room for two motor cars or carriages to pass on one side of the tracks. To require an overtaking automobile or carriage to drive to the left from behind an electric car into automobiles or carriages going in the opposite direction to say the least introduces confusion into travel, which may result in imminent hazard of injury.

6. The traveller alighting from the right hand side of a street car will be subjected under the other interpretation to the danger of vehicles approaching from a direction opposite to that in which the car is moving, while those alighting from either side must be prepared to avoid them coming from a direction to which they have been unaccustomed. The question is not whether the driver of an automobile should stop before passing a stationary car. That situation is not covered by the law of the road nor by this decision. It is governed by the general rules of negligence.

7. The other rule finds support in the provisions of R. L. c. 54, § 2, which if construed literally requires one vehicle passing another to do the very thing which has been shown to be inherently dangerous, namely, to go to the left of the middle of the way; that is to say, into that part of the way appropriated to traffic going in the opposite direction. In the crowded streets of cities not only is this not the rule observed in practice, but passing vehicles are never allowed in the left of the middle of the way, even if they cannot otherwise pass those in front of them. Whether this section should or should not be construed to apply to those ways only when there is only room for two vehicles abreast it ought not to be decisive of the question under discussion.

We think the ruling requested was refused rightly.

CLARA B. CHILDS & others vs. BOSTON AND MAINE RAILROAD.

Franklin. September 17, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Way, Private. Deed, Construction. Equity Jurisdiction, To enforce equitable easement.

The owner of a farm conveyed by deed to a railroad corporation land partly within the railroad location of the grantee which divided the farm of the grantor. The deed contained at the end of the description of the land conveyed the following provision: "And it is understood and agreed that the said company are . . . to make me a good and sufficient crossing for carting across said railroad near my bar place or at such other place as we can agree upon." Soon after the conveyance a crossing was constructed, which was used by the grantor until he conveyed his farm to another, who thereafter used the crossing until it was closed by the successor of the railroad corporation. In an action of tort for the obstruction of the alleged right of way, *it was held*, that the clause could not operate as an exception, because it created a new right of way, nor as a reservation of an easement in fee because the word "heirs" was not used, so that the action at law could not be maintained; but *it was said*, that the clause created an equitable easement founded on contract which could be enforced in equity.

TORT against the Boston and Maine Railroad for the alleged wrongful obstruction of a right of way claimed by the plaintiffs across a railroad location of the defendant at Deerfield. Writ dated April 15, 1910.

In the Superior Court the case was tried before *Fessenden, J.* The facts are stated in the opinion. The deed from David W. Childs to the Connecticut River Railroad Company was dated March 6, 1846. The clause which is quoted in the opinion was at the end of the description of the land conveyed and was followed by the habendum clause. The whole of the clause was as follows: "And it is understood and agreed that the said Company are to erect a good and sufficient fence on the East and west side of said last lot — and on the West side of the first lot and maintain the same and to make me a good and sufficient crossing for carting across said rail road near my bar place or at such other place as we can agree upon. Also a passage over near the north end for my cows to pass over."

The judge ordered a verdict for the defendant; and the plaintiffs alleged exceptions.

W. A. Davenport, for the plaintiffs.

D. Malone, for the defendant.

RUGG, C. J. This is an action of tort for the obstruction of an alleged right of way over a location occupied by the defendant. In 1846, David W. Childs, owning a farm through which the Connecticut River Railroad had been located recently, conveyed to that corporation land partly included within its location by a deed containing this language: "And it is understood and agreed that the said company are . . . to make me a good and sufficient crossing for carting across said railroad near my bar place or at such other place as we can agree upon." There is nothing in the record to show that there was any crossing in existence at this time, and whatever inference may be drawn from the language of the deed tends to show that there was none. But one was made soon after, and used continuously until it was closed in 1907 by the defendant, who has succeeded to the rights of the Connecticut River Railroad Company. In 1876 David W. Childs conveyed his farm to one Stebbins, who later deeded a portion to the predecessor in title of the plaintiffs.

The plaintiffs have argued that they have the way in question by necessity. But the facts do not support this contention. Their land is accessible by highway, and though this means of approach is less convenient than the one here claimed, it does not appear to be such as to deprive them of reasonable use of their land. It follows that there is no way by necessity. *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572.

There is no evidence requiring a finding that there is a right of way by prescription. The deed of David W. Childs to the Connecticut River Railroad Company gave him, at least, a right to use the way during his occupation of the farm as owner, and hence no adverse use began before 1876. Therefore, there was not the requisite period of use to establish a prescriptive right before the passage of St. 1892, c. 275 (now St. 1906, c. 463, Part II, § 125) which prohibited the acquisition of such rights of way by prescription.

The important question is the construction of the clause in

the Childs' deed to the railroad which has been quoted. An easement of a right of way can be created only by grant, express or implied, or by prescription which rests on the fiction of a lost grant, *Drew v. Wiswall*, 183 Mass. 554, or by exception in a conveyance which carves out the easement from a larger estate and, retaining that in the grantor by virtue of his original ownership, passes to the grantee an estate thus encumbered. *Wood v. Boyd*, 145 Mass. 176. The clause in the present deed can not operate by way of exception because it created a new right of way not before used or existing, the burden of fashioning which was placed upon the railroad company. *White v. New York & New England Railroad*, 156 Mass. 181. *Hamlin v. New York & New England Railroad*, 160 Mass. 459. *Simpson v. Boston & Maine Railroad*, 176 Mass. 359. *Walker Ice Co. v. American Steel & Wire Co.* 185 Mass. 463, 470. *Foster v. Smith*, 211 Mass. 497, 503. The language cannot be construed as a reservation of an easement in fee, and thus as an implied grant, because of the omission of the word "heirs," which is essential to the creation of any estate greater than a life estate. *Ashcroft v. Eastern Railroad*, 126 Mass. 196. *Bean v. French*, 140 Mass. 229. *Hogan v. Barry*, 143 Mass. 538. A technical easement in fee is not shown. The clause is in form an agreement. It is in a deed poll and not in the form of a technical covenant sealed by the grantee. Hence, under the decisions it is not a covenant running with the land, and no action of contract lies between the owners of the estates subsequent to the original contracting parties. *Maine v. Cumston*, 98 Mass. 317. *Martin v. Drinan*, 128 Mass. 515. *Kennedy v. Owen*, 136 Mass. 199.

The position of the stipulation in the instrument at the end of the description and its substance both indicate that the performance of it by the Connecticut River Railroad Company was a substantial part of the consideration for the conveyance. The grantor was the owner of a farm, which has been divided by the location of the railroad. Access from one part to another of his farm which theretofore had been free was seriously interfered with by the railroad location. Unless provision was made for the crossing, the value of his land would be greatly diminished. The property was so situated and of such a character that it was likely to continue for a long time to be

valuable chiefly for agriculture. It is hard to believe that the farmer would have made a conveyance to a railroad company of the fee of land, a part of which apparently lay outside the railroad location, without securing or intending to secure to himself a right of way which would join his dismembered farm. These were the circumstances of the parties when they made the written agreement. Interpreting the language in the light of their situation at the time they used it (as ought to be done in order to understand what they meant), it appears to express an intent that the right of way should continue to exist, not merely during the life of the grantor, nor during his occupancy, but in perpetuity for the benefit of the two tracts of land into which the farm unit, as it was before the location of the railroad, had been severed. See *Bronson v. Coffin*, 108 Mass. 175, 180; *Norcross v. James*, 140 Mass. 188. It is a contract occurring in a deed in the defendant's chain of title, and being a matter of record binds the estate of the defendant. As it does not create a technical legal easement, an action of tort does not lie for an encroachment upon it. *Clafin v. Boston & Albany Railroad*, 157 Mass. 489, and cases cited.

The right is in the nature of an equitable restriction over land of the defendant arising by contract, which in effect establishes a quasi easement respecting the perpetual use and enjoyment of real estate. The case is well within the authority of *Bailey v. Agawam National Bank*, 190 Mass. 20, as to the nature and extent of the right created. The facts show a violation by the defendant of this right. It is in the nature of an easement appurtenant to the estate of the plaintiffs of an equitable servitude upon the estate of the defendant. As has been shown, no remedy at law is open. The rights and obligations in essence do not differ materially from those enforced in equity. Even though the plaintiffs' right is founded in contract, specific performance of contracts when no other adequate remedy can be afforded is a familiar ground of equitable relief. Obligations in the nature of servitudes are protected in equity where there is no personal duty. The situation is one for which the remedy granted by equity is peculiarly apt. No reason appears why it should not be given. In this respect also *Bailey v. Agawam National Bank*, 190 Mass. 20, is an authority. *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319, 328. *Gray v. Kelley*, 194 Mass. 533. *Peck v. Conway*, 119

Mass. 546. *Smith v. Smith*, 148 Mass. 1, 5. *Nash v. New England Mutual Life Ins. Co.* 127 Mass. 91, 97. Equitable relief would be complete and extend not only to the reopening of the way, but to the ascertainment of damages accrued in the past. *Downey v. Hood & Sons*, 203 Mass. 4, 11.

It follows that the plaintiffs must fail in this form of action. If before the entry of final judgment a motion should be filed to amend into a suit in equity, its disposition would be within the discretion of the Superior Court. *Merrill v. Beckwith*, 168 Mass. 72, 74.

Exceptions overruled.

SAM ZWICKER vs. EDWIN S. GARDNER, executor.

Hampden. September 23, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Frauds, Statute of.

Where a mortgagee of real estate orally agreed that, if the mortgagor would refrain from bidding at a foreclosure sale of the property, the mortgagee would bid in the property and afterwards would sell it at private sale and would pay to the mortgagor any balance that remained over the amount of the mortgage with interest and expenses, and where in pursuance of this agreement the mortgagee bid in the property and sold it at private sale for a sum in excess of the amount of the mortgage with interest and expenses, the statute of frauds is not a bar to an action of contract by the mortgagor to recover such excess in the hands of the mortgagee, the part of the contract relating to the purchase and sale of the real estate having been performed, and the promise to account for and pay over the excess being separable from the rest of the contract.

MORTON, J. The plaintiff mortgaged certain premises to the defendant's testator. The defendant's testator instituted foreclosure proceedings and the plaintiff alleges that the defendant's testator agreed that if he, the plaintiff, would not bid at the foreclosure sale or procure other persons to bid, he, the defendant's testator, would bid the premises in and sell them at private sale and pay over to the plaintiff any balance that remained after deducting the mortgage, interest and expenses. The plaintiff alleges that he refrained from bidding or procuring others to

bid at the foreclosure sale, and that the defendant's testator bid the premises in and afterwards sold them at private sale for a sum in excess of the mortgage, interest and expenses. This is an action to recover such excess. The case was sent to an auditor, who found the facts to be as alleged by the plaintiff, and was heard by a judge of the Superior Court * without a jury upon the auditor's report. The judge ruled and found in favor of the plaintiff. The case is here on exceptions by the defendant to the refusal of the judge to rule as requested by the defendant that the contract was within the statute of frauds and that the plaintiff could not recover. It was agreed that the contract, if there was one, was not in writing and that there was no note or memorandum thereof in writing signed by the defendant's testator, or by any one by him thereunto lawfully authorized.

We think that the ruling and finding of the judge were right. This is not an action to enforce an oral contract for the sale of land or an interest in or concerning the same. The land has been sold and nothing remains to be done except for the defendant to account for and pay over the excess. That part of the contract is separable from the rest of the contract and, the rest of the contract having been performed, there is no reason why this part of it should not be enforced. And to that effect see *Page v. Monks*, 5 Gray, 492; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Graffam v. Pierce*, 143 Mass. 386. The case of *Kennerson v. Nash*, 208 Mass. 393, cited by the defendant, is entirely different from the case before us. It is not necessary to consider whether, if the contract did come within the statute of frauds, it would have been taken out of the statute by part performance.

Exceptions overruled.

The case was submitted on briefs.

C. G. Gardner & R. W. Stoddard, for the defendant.

G. A. Bacon & T. H. Kirkland, for the plaintiff.

* *Hardy, J.*

DONALD MORIARTY *vs.* CONNECTICUT VALLEY STREET RAILWAY
COMPANY.JOHN J. MORIARTY *vs.* SAME.

Hampshire. October 1, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Negligence, Street railway, In use of highway.

In an action against a street railway company for injuries sustained by reason of a horse and wagon driven by the plaintiff being run into by a car of the defendant at the junction of two streets, it could have been found that as the plaintiff approached the corner he saw the car of the defendant coming on the intersecting street and brought his horse to a stop twenty feet from the curve by which the railway tracks entered the street on which he was driving, that the car then stopped at a white post on the intersecting street with the fender about a foot over the cross walk, and that thereupon the plaintiff started his horse, that when the horse's head was about opposite the car the bell was rung for starting and the motorman, who was facing the rear of the car, turned around and immediately started the car without looking to the right or the left for approaching travellers, that the plaintiff called to the motorman to stop and tried to turn his horse to the left, but that the car continued in motion, knocked down the horse and caused the injuries sued for. *Held*, that there was evidence for the jury of due care of the plaintiff and of negligence of the defendant's servants.

TWO ACTIONS OF TORT, the first by a boy nine years of age when injured, and the second by the father of the plaintiff in the first case, for personal injuries to both plaintiffs and damage to the property of the plaintiff in the second case by reason of the alleged negligence of the servants of the defendant in operating one of its electric cars. Writs dated March 28, 1910.

In the Superior Court the cases were tried together before *Sanderson, J.* The facts which could have been found upon the evidence are stated in the opinion.

At the close of the evidence the defendant asked the judge to rule that neither of the plaintiffs was in the exercise of due care, that there was no evidence of negligence on the part of the defendant and that neither plaintiff was entitled to recover. The judge refused to rule as requested, and submitted the cases to the jury who returned a verdict for the plaintiff in the first case in the sum of \$900 and a verdict for the plaintiff in the second case in the sum of \$125. The defendant alleged exceptions.

The cases were submitted on briefs.

F. L. Greene, for the defendant.

G. P. O'Donnell, for the plaintiffs.

DECOURCY, J. These actions of tort, tried together, are brought to recover for injuries resulting from a collision which occurred at the intersection of two streets in Northampton, between a car of the defendant and the horse and wagon of the plaintiff, John J. Moriarty.

Upon the evidence the jury could find the following facts: North Street runs easterly from and at right angles with King Street; and the North Street car tracks curve to the south to connect with the King Street tracks. It was dusk at the time of the collision, but the place was well lighted by an electric lamp at the intersection of the streets and by the electric headlight on the car. The plaintiff, John J. Moriarty and his employee occupied all the seat of the wagon, and his son Donald was seated upon one of the bags in the body of the vehicle. They were travelling northerly on the right hand side of King Street. As they approached the corner, the driver Moriarty saw this car on North Street, coming toward King Street, and he brought his horse to a halt within twenty feet of the curved track which crossed the roadway. The car then stopped at a white post on North Street, with the fender about a foot over the cross walk; and the driver, John J. Moriarty, seeing that his course was unobstructed, set forward. When the horse's head was about opposite the car, the starting bell was rung. The motorman, who was then facing the rear of his car, apparently talking with some one, turned around and immediately started the car in motion, without looking to the right or left along King Street for approaching travellers. Moriarty called out to him to stop, and endeavored to turn the horse to the left, but the car continued on, knocked down the horse, broke the wagon and harness and threw the plaintiff Donald to the ground.

From this summary statement of the facts in evidence it is manifest that the issues of the defendant's negligence and the due care of the plaintiffs were for the jury. *Smith v. Holyoke Street Railway*, 210 Mass. 202.

Exceptions overruled.

MICHAEL S. DONOVAN vs. CONNECTICUT VALLEY STREET RAILWAY COMPANY.

Franklin. October 1, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Negligence, Due care of plaintiff, Street railway, Violation of town regulation.

Where the track of a street railway is laid on one side of the wrought part of a road of a town, the nearer rail of the track being less than twelve feet distant from the piazza in front of a store, and the driver of a delivery wagon employed by the proprietor of the store, after looking in both directions and seeing no car approaching, backs his horse and wagon across the track, dismounts from the wagon, lets down the tailboard, and, climbing into the wagon, proceeds to unload a barrel from it, when he hears a gong and almost immediately the team is struck by a car approaching at an excessive rate of speed and he is thrown out and injured, in an action for his injuries thus caused the question whether he was in the exercise of due care is for the jury to decide upon the evidence presented.

The violation by a street railway company of a regulation, established by the selectmen of a town and approved by the board of railroad commissioners, concerning the speed of cars upon street railways in the town, is evidence of negligence in an action against the street railway company for personal injuries alleged to have been caused by a car of the defendant when running at an excessive rate of speed.

TORT for personal injuries sustained by the plaintiff on the morning of October 9, 1906, on Deerfield Street in the town of Greenfield, by being thrown from a delivery wagon which was struck by a car of the defendant. Writ dated April 2, 1907.

In the Superior Court the case was tried before *Hardy, J.* The plaintiff testified that on the morning he was injured he had backed his wagon up in front of the store of his brother, Edward Donovan, to unload a barrel of sugar which he had brought from a storehouse. It appeared that Edward Donovan's store was situated on the west side of Deerfield Street, and that the defendant's track was laid through the wrought part of Deerfield Street and past the store, and that the track was laid to the west of the centre of the road. It also appeared that from the piazza or porch in front of the store to the westerly rail of the defendant's track was a distance of eleven feet and ten inches, that the wagon in which the plaintiff was driving "was from five to six feet in

width, and that the team over all, including the horse, was sixteen feet in length."

According to the plaintiff's testimony, before turning to back his team across the track, he looked up and down the street for a car but saw none. He then backed his team across the track, dismounted from the seat, which was at the front of the wagon, passed around upon the north side of the wagon and unbuckled the tailboard, climbed in and laid his hands on the barrel and was going to twist it around to take it out of the end of the wagon, with his face to the south, when he heard the bell or gong of a car sounded behind him. Upon hearing the gong, which he testified was the first thing which attracted his attention to the approach of the car, he seized with his left hand the reins and slapped the horse with them at the same time speaking to the animal; as he spoke the car struck him and he was thrown from the wagon and rendered insensible. The car was coming from the north.

The plaintiff testified further that he had been employed for about a year as both a motorman and a conductor on the defendant's cars, that he left its employ about a year before the accident, and that for fully six months he had been employed upon the division of the railway passing his brother's store. He also testified that six regular cars of the defendant passed the place where he was injured at intervals every hour, besides several express cars during the day, and that he knew the running time of the cars on the defendant's road.

Edward Donovan testified that at the time of the accident he was in his store at work opposite a window out of which he could see up the hill to the north for four or five hundred feet along the track of the defendant. He heard and saw the car approach "at a good rate of speed." In about one half a minute he heard the bell on the car go "tap tap," and in the space of time that he could count five he saw the plaintiff thrown up in the air and the horse thrown on his knees out in the street.

Other material evidence is stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

- "1. That upon all the evidence the plaintiff cannot recover.
- "2. That there was no evidence that the plaintiff was in the exercise of due care.

"3. That a person who stops his wagon upon the track of an electric street railway in daylight at a point from which he can see an approaching car for a distance of about seven hundred and seventy feet, and who makes no effort to remove his wagon until a car is within four or five feet of him is not in the exercise of due care.

"4. That a person having stopped his wagon upon the track of an electric street railway in daylight at a point from which he can see an approaching car from a distance of about seven hundred and seventy feet, then dismounts from the wagon, unstraps and lets down the tailboard, and then, without either looking or listening for an approaching car, climbs into the wagon from the rear, is not in the exercise of due care; unless he has so recently looked or listened for an approaching car that he cannot reasonably expect a car to reach the place occupied by the horse before he can remove from danger.

"5. That a person who climbs into a wagon harnessed to a horse, with no one at the moment in control of the horse, and the horse standing between the rails of an electric street railway, without looking or listening for an approaching car is not in the exercise of due care unless he has so recently looked or listened for an approaching car that he cannot reasonably expect a car to reach the place occupied by the horse before he can remove from danger."

The judge refused to make any of these rulings, and submitted the case to the jury with other instructions. The defendant excepted to the refusal of the rulings requested and to the charge so far as it was inconsistent with the defendant's requests for rulings.

The jury returned a verdict for the plaintiff in the sum of \$366.66; and the defendant alleged exceptions.

The case was submitted on briefs.

F. L. Greene & J. C. Lee, for the defendant.

F. J. Lawler, for the plaintiff.

MORTON, J. The plaintiff introduced evidence tending to show that on the morning of the accident he had backed up in front of his brother's store in Greenfield the delivery wagon which he had been driving, and was in the act of unloading a barrel of sugar therefrom, when the wagon was struck by one of the de-

defendant's cars and the plaintiff was thrown from the wagon, receiving the injuries complained of and to recover for which this action was brought. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings that were requested by the defendant.

It could not be ruled as matter of law that the plaintiff was not in the exercise of due care. He had the right to back his wagon up to the store as he did, and he testified that before doing so "he looked up and down the street for a car but saw none." It was for the jury to say whether, in view of the frequency with which cars came along the track, he should have looked again before or while attempting to unload the barrel, or whether he did all that could be done to avoid an accident after he heard the gong or saw the car. It was also for the jury to say whether, in view of the distance at which a car could be seen, he looked carelessly if he looked as he said he did, or whether, in view of some of the testimony as to the speed of the car, it was more probable that there was no car in sight when he looked. See *James v. Interstate Consolidated Street Railway*, 193 Mass. 264; *Kerr v. Boston Elevated Railway*, 188 Mass. 434; *Jeddey v. Boston & Northern Street Railway*, 198 Mass. 232.

It could not be ruled as matter of law that there was no evidence of negligence on the part of the motorman. The rules and regulations established by the selectmen and approved by the board of railroad commissioners concerning the speed of cars upon street railways in Greenfield provided that no car should be operated at a speed greater than eight miles an hour along that portion of the street where the accident occurred. There was evidence tending to show that the car was running at the rate of twenty miles an hour. This was or could have been found to be of itself some evidence of negligence. *Stevens v. Boston Elevated Railway*, 184 Mass. 476. In addition, the same evidence which tended to show that the plaintiff should have seen the car tended also to show that the motorman in the exercise of due care should have seen the wagon in time to avoid a collision. There was also evidence tending to show that the gong was not sounded, and that the car was running at an excessive rate of speed, and that other regulations in regard to the operation

of the car besides those relating to speed were violated by the motorman.

Whether the rails were wet and slippery and the collision was due to that circumstance, and whether the motorman did all that he could to avoid the accident were likewise plainly questions of fact for the jury. It seems to us that the case was rightly left to the jury.

Exceptions overruled.

HERBERT SAWIN vs. CONNECTICUT VALLEY STREET RAILWAY COMPANY.

Franklin. October 3, 1912. — November 25, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Street railway. Street Railway. Way, Public. Practice, Civil, Rulings and Instructions.

An action against a street railway company by a passenger for personal injuries received in an accident caused by the giving way of a culvert maintained by a town under a highway upon which the defendant's railway was constructed was heard by a judge without a jury, who ruled that the defendant "was bound to maintain beneath its tracks within the highway over the culvert such structure or foundation as to enable it to run cars safely thereover in the event that the town . . . failed so to do," and found for the plaintiff. On exceptions by the defendant this ruling was interpreted to mean, not that the defendant was bound to guard against every conceivable emergency, but that it was bound to discharge the obligations of a common carrier in regard to the foundations of its tracks, and that it did not discharge such obligations by relying upon the town and its officers to do their duty as to the culvert, and, so interpreted, the ruling was *held* to be correct.

The grant to a street railway company of the privilege of laying tracks and running cars upon a highway for the transportation of passengers by necessary implication includes the power and imposes the obligation to construct and maintain within the limits of the highway such foundations and supports as are required for the reasonable conduct of its business and the safety of its passengers.

RUGG, C. J. This is an action of tort to recover damages for injuries sustained by the plaintiff while a passenger upon a car of the defendant. The accident occurred in the town of Montague, at a place where the defendant's tracks had been constructed in accordance with a location duly granted within the limits of the highway, but on its side and not within its wrought portion.

The cause of the accident was the giving way of a culvert in consequence of a heavy rain following a severe snow storm. This culvert had existed long before the construction of the defendant's tracks, and had been maintained by the town of Montague, except that since the laying of the defendant's tracks in 1896 it had been washed out twice, and thereafter had been enlarged and lengthened, to the expense of which by agreement the defendant contributed. The culvert was wholly within the highway. Its dimensions were determined by the town authorities, and it carried the surface water from a considerable territory lying outside the highway. The immediate cause of the accident was the flowing of water over the highway and tracks of the defendant by reason of obstruction of the culvert by ice. In previous years the town had kept the culvert clear, but did not do so during the year of the accident, although the defendant had no knowledge of any change in its practice. Water upon and over the tracks of the defendant was not unusual. Upon these facts the Chief Justice of the Superior Court "found as matters of fact that the defendant company was not negligent in regard to the condition of its car tracks or power nor in the management of its car at the time of the accident, but, however, ruled that the defendant company was bound to maintain beneath its tracks within the highway over the culvert such structure or foundation as to enable it to run cars safely thereover in the event that the town of Montague failed so to do." Having made these findings and this ruling, he found for the plaintiff. The defendant's exception to the ruling brings the case here.

This ruling is interpreted to mean that the defendant was bound to discharge the obligations of a common carrier touching the foundations of its tracks, not that it was absolutely bound to guard against every conceivable emergency, and that it did not discharge such obligations by relying upon the town and its officers to do their duty as to the culvert.

There is nothing in the record to indicate that there were terms or conditions in the original location granted to the defendant, by which it was bound to do anything as to the culvert. Reasons which might apply under such circumstances, therefore, may be laid on one side. See *Selectmen of Gardner v. Templeton Street Railway*, 184 Mass. 294; *Selectmen of Wellesley v. Boston &*

Worcester Street Railway, 188 Mass. 250; *Mayor & Aldermen of Worcester v. Worcester Consolidated Street Railway*, 192 Mass. 106; *Selectmen of Clinton v. Worcester Consolidated Street Railway*, 199 Mass. 279. The point now presented for decision has never before arisen in this Commonwealth. It has nothing to do with the repair of the surface of highways for general travel. Cases like *Leary v. Boston Elevated Railway*, 180 Mass. 203, and *Hyde v. Boston*, 186 Mass. 115, have no bearing.

The precise point is the extent to which a street railway company is required in the performance of its duty as a common carrier of passengers to provide for the support of its track and the extent to which it may rely upon the public authority in this regard. The obligation to its passengers in justice can be no more extensive than its power to provide adequate foundations. In reason, the street railway company cannot be held to a degree of liability higher than it can provide against in the exercise of its right. The statutes make no definite provision upon the subject. The board granting the location is empowered to "prescribe how the tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and" as to matters not treated in the general provisions of law in addition may "impose such other terms, conditions and obligations, incidental to and not inconsistent with the objects of a street railway company, as the public interests may in their judgment require." St. 1906, c. 463, Part III, §§ 7, 64, 65, as amended by St. 1909, c. 417, §§ 1, 2, 3. The laying of tracks, in a broad sense, includes the preparation of proper foundations to support the weight of the rails, cars and loads carried, as well as the amount and character of ballast to be used and the size and type of rails and the nature of their binding. By St. 1906, c. 463, Part III, § 79, a street railway company is authorized to "open any street, highway or bridge in which any part of its railway is located, for the purpose of making repairs or renewals," and the officer having charge of streets is required to issue permits therefor. The fair implication from the language of the statute is that, in addition to the express requirements of the public board as set forth in the location, the company may satisfy the reasonable needs of its business in the respects pointed out, both in original construction and in subsequent repairs.

Broader considerations lead to the same conclusion. The street railway company is an instrumentality for the accommodation of public travel. As a common carrier of passengers, it is bound to exercise the utmost diligence consistent with the nature and extent of its business and its practical operation for the safety of those whom it undertakes to transport. It is authorized to use instrumentalities denied to the ordinary traveller upon highways. Its cars are as matter of common knowledge far heavier than vehicles for which municipalities are required by law to maintain highways in safety. The teams and carriages, for the safe and convenient passage of which by travellers the highways must be kept in repair under R. L. c. 51, § 1, are confined to the same general kind in use when the statute first was enacted, and do not include electric cars. *Doherty v. Ayer*, 197 Mass. 241. Moreover, the weight of carriage for which liability exists on the part of a city or town for failure to repair does not exceed six tons (R. L. c. 51, § 18), a weight much less than that of the electric car in common use. If in other respects the way is safe and convenient for the ordinary traveller, it does not become out of repair merely because not safe for such an instrumentality of travel as an electric car. The duty of the public authority toward the traveller in the street car is different from that assumed by the common carrier toward its passenger transported for hire.

The location of a street railway within the limits of a public way imposes upon the city or town no obligation toward the street railway company of changing the way so that it may be fit and convenient for the construction and maintenance of tracks, poles or other appliances for the operation of the railway. The company in this respect takes the street as it finds it, and must make it suitable to its needs without the aid of the municipality. If by reason of the grade of the streets, the character of its soil or the presence of other structures in it, a necessity arises to make special and peculiar adaptations in order to repair the roadbed or construct its railway, this work devolves upon the company, and not upon the public authority. A consideration of other kinds of corporate structures in streets confirms this view. A telegraph or telephone company, given a right to set up and maintain a line of poles in public ways, cannot require the municipality to make firm ground of a swamp along a roadside. The company must

prepare such strength of support as the weight superimposed upon its poles may need. Nor can it demand a cutting of the underbrush or trimming of trees at the expense of the city or town in order that the wires may be strung from pole to pole. Public service corporations may be permitted to lay conduits and pipes beneath the surface of public ways under numerous statutes. If in the course of excavation for such purpose quicksand should be encountered, the municipality could not be compelled to overcome this obstacle in order that a secure foundation be afforded for the conduit or pipe.

A street railway company acquires by its location a right in the nature of a license to occupy portions of the street for purposes of its travel. As to the preparation of the place where the license is to be exercised, it stands upon no higher ground than other licensees. Its right is a peculiar privilege to modify to some extent the use of the public way, and by such modifications to enjoy in common with others the easement of public travel, according to the limitations and advantages which accrue from the employment of rails and cars. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515. *Union Railway v. Mayor & Aldermen of Cambridge*, 11 Allen, 287. It obtains no right of private property in the soil of the street. *Connecticut Valley Street Railway v. Northampton*, ante, 54. *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500. In many parts of the Commonwealth locations have been granted upon the side of the road to street railway companies. It has been the practice under these circumstances for the railway company to make such clearing of obstructions, changes in the grade, blasting of ledges, construction of culverts, fitting of foundations and preparation of ballast as its necessities demand, at its own expense and without cost to the city or town. Indeed, the right of the street railway company to do this is recognized in *Worcester v. Worcester & Holden Street Railway*, 194 Mass. 228. See also *Hyde v. Boston & Worcester Street Railway*, 194 Mass. 80; *Laroe v. Northampton Street Railway*, 189 Mass. 254; *Underwood v. Worcester*, 177 Mass. 173. It appears to be authorized as to ways proposed for State highways by St. 1909, c. 417, § 4.

The power to establish the necessary supports to make safe its traffic is implied from the nature and purpose of the location of the street railway. It comes within the generalization of Chief Justice Shaw respecting the location of a horse railroad, in *Commonwealth v. Temple*, 14 Gray, 69, 77: "Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and where such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement." Although the Legislature has changed the obligation of street railway companies touching the care of the streets for other travel than its own from time to time, and finally has abrogated it altogether in most instances, this comprehensive statement of the law never has been limited.

The grant to a common carrier of passengers of the privileges of laying tracks and running cars for transporting the public, and thus facilitating the easement of travel, carries with it by necessary implication the right to establish such foundations and supports within the limits of the street as are required by the reasonable conduct of its business and the safety of its passengers. This implied power must be exercised in accordance with such terms as the board granting the location may impose under the statute. Where terms of the location are silent or not specific, the power must be exercised with a reasonable regard to the rights of others and of the general public. But it exists and must be exercised before the street railway company can be said to have discharged its obligation to its passengers. In the absence of any evidence as to the terms of the location, it cannot be assumed that the public authorities in granting it would hamper the power and duty of a street railway company to make its track safe. A street railway company voluntarily assumes to be a common carrier of passengers within public streets and highways. It may accept or renounce the onerous burdens imposed upon it as such with knowledge of the conditions under which they must be performed. The street railway company stands on a different basis in this regard from other common carriers upon highways, such as owners of coaches, stages or automobiles. These are given no special privileges in the streets, and must use

the surface as provided by the public. But street railway companies possess extensive rights denied to other travellers, as to size and weight of vehicles employed, as to route of travel and powers of doing work, and as to their track within the limits of the way, and may be held to a correspondingly larger obligation.

There is nothing inconsistent with this view in *Birmingham v. Rochester City & Brighton Railroad*, 137 N. Y. 13, which had to do with an accident occurring upon a bridge spanning a canal, over which as matter of law the railroad company could exercise no control, and over which it must pass on the same terms as any other traveller. See *Indianapolis v. Cauley*, 164 Ind. 304; *Elgin, Aurora & Southern Traction Co. v. Hench*, 132 Ill. App. 535. This judgment does not define the obligations of street railway companies as to bridges, which may be built under special statutes and with varying obligations and conditions attached to their construction, maintenance and repair.

The result is that, as the defendant possessed the power to construct such supports within the limits of the highway as would render its railway safe for the discharge of the duties resting upon it as a common carrier of passengers, it may be held liable in this action.

Exceptions overruled.

The case was submitted on briefs.

F. L. Greene & F. N. Thompson, for the defendant.

F. J. Lawler, for the plaintiff.

OLIVER DITSON COMPANY vs. A. M. TESTA.

Suffolk. November 22, 1912. — November 25, 1912.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Appeal. Supreme Judicial Court.

No appeal lies to this court from an order of the Superior Court overruling an answer in abatement, such order being interlocutory.

RUGG, C. J. This is an appeal from an order of the Superior Court overruling a plea in abatement. There has been no trial on the merits and no judgment. Hence the case is not properly

here. It has been decided many times that this court has no jurisdiction to consider an appeal from any interlocutory decision until after judgment unless the judge reports the question. *Cotter v. Nathan & Hurst Co.* 211 Mass. 31, and cases cited. *Cummings v. Ayer*, 188 Mass. 292. *Fay v. Upton*, 153 Mass. 6. *Shawmut Commercial Paper Co. v. Cram*, 212 Mass. 108.

Appeal dismissed.

The case was submitted on briefs.

C. Toye, for the defendant.

A. M. Schwarz & S. A. Dearborn, for the plaintiff.

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PERINO ANGELARY *vs.* SPRINGFIELD STREET RAILWAY
COMPANY.

Hampden. September 23, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Due care of plaintiff. *Practice*, *Civil*, Exceptions.

In an action against a street railway company for personal injuries, sustained by a boy less than twelve years of age, there was evidence on which it could have been found that the plaintiff had been sitting at the rear end of a wagon that was being driven on a country road in a course parallel to and from four to seven feet distant from the track of the defendant's railway, that, on the stopping of the wagon, the plaintiff alighted, passed from the rear of the wagon to the side next the track, and stood facing the wagon, helping his sister to alight from it, when he was struck and injured by the running board of a car of the defendant, moving in the same direction in which the wagon had been going, which had come very quickly without the sounding of a gong or other warning of its approach, that when the plaintiff was sitting at the end of the wagon he looked over the track in the direction from which the car came and that his view was unobstructed for a long distance, and that after getting off the wagon he looked again, but that he failed in each instance to see the car, which could have been found to have been plainly visible. *Held*, that, if the plaintiff looked carelessly and therefore must be deemed to have seen the car, his failure to exercise the judgment of an ordinary adult traveller, who would have appreciated that the overhang of the car was so great that he was in danger of being struck by it, was not negligence as matter of law, and that, even if the plaintiff had neglected to look or to listen for a car, this would not show conclusively that he was not in the exercise of such care as boys of his age, capacity and experience should be required to exercise.

Upon an exception to a statement contained in the charge of a presiding judge, where nothing appears in regard to the rest of the charge, it will be assumed that full and appropriate instructions upon all pertinent questions of law were given.

An exception to a statement in the charge of a judge on the ground that it submitted a question of law to the jury will not be sustained where it appears that if the jury passed upon the question of law they decided it rightly so that the excepting party could not have been prejudiced.

TORT, by a boy eleven years and nine months of age when injured, for personal injuries sustained on June 17, 1908, from being struck by an open electric car alleged to have been operated negligently by the servants of the defendant upon the defendant's street railway on a country road in the town of Agawam. Writ dated November 23, 1908.

In the Superior Court the case was tried before *King, J.* The material facts which might have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover and to order a verdict for the defendant. The judge refused to rule as requested and submitted the case to the jury.

In the course of his charge the judge instructed the jury as follows: "The court said in one opinion as illustrating one feature that may bear upon this case 'In our opinion, if one crossing the tracks of a street railway testifies that he looked to see whether a car was coming (when the car was in fact in plain sight) and that he did not see it, he must have looked carelessly and is in no better position than if he had not looked at all.' [194 Mass. 243.] Whether or not, however, that applies to one who is not on the track, nor about to cross it, but who is simply getting out of a wagon that is driven four to seven feet from and parallel to the track, and away from it, and aiding another to dismount from that wagon, it is for you to say." The defendant excepted to the statement of the judge contained in the last sentence of this instruction.

The jury returned a verdict for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

W. P. Hayes, for the plaintiff.

BRALEY, J. The defendant, although asking generally at the close of the evidence that a verdict be ordered in its favor, has waived the question whether there was any proof of its negligence, and contends, as matter of law, that the plaintiff failed to exercise due care. It appears that with four other children, including his sister, the plaintiff was riding in a wagon moving over the roadway parallel to, and within four to seven feet of, the defendant's railway track located at the side of the way. The evidence, while conflicting, would have warranted the jury in finding that as the driver stopped the plaintiff alighted, passed around from the rear to the side next to the track, and stood fronting the wagon helping his sister to alight by the steps between the wheels, when an open car moving in the same direction with the wagon came up and he was struck and injured by the running board. It may be assumed in the defendant's behalf, and in accordance with the plaintiff's evidence, that when sitting on the floor at the rear end of the wagon he looked over the track on which the car approached, where his view was unobstructed for a long distance, and in passing from the wagon he again looked, but failed in each instance to observe the car, which the jury could find was plainly visible. It is urged that he stands no better than if he had neglected to look at all, and consequently must be held to have acted carelessly. *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242, 243. *Willis v. Boston & Northern Street Railway*, 202 Mass. 463, 465. *Kennedy v. Worcester Consolidated Street Railway*, 210 Mass. 132. But the plaintiff at the time of the accident was not quite twelve years of age, and the degree of prudence required of him cannot be measured by the standard applicable to adults when acting under similar conditions. "It is commonly a question of fact to be determined in each case as it arises, whether considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed. A situation, which might carry plainly to the mind of an adult comprehension of danger, might make little or no impression upon a child." *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 495. See also *Dowd v. Tighe*, 209 Mass. 464, 467, and cases cited; *Callahan v. Dickson*, 210 Mass. 510. The gong was not sounded nor any warning given by the motorman, and the exceptions

state that the events leading to the accident "happened very quickly." The plaintiff, while required to use proper care, might rely upon the presumption that the defendant's motorman and conductor also would exercise reasonable diligence. *Donovan v. Bernhard*, 208 Mass. 181, 182. It does not appear that he knew, or from personal experience ought to have known or anticipated, that a passing car might project beyond the rail sufficiently to expose him to the danger of a collision, and it is of some significance that the wagon remained untouched. If as the defendant contends the plaintiff looked carelessly, and therefore must be deemed to have seen the car, his failure to exercise the judgment of the ordinary adult traveller, who could be found to have appreciated the possible danger from the overhang, cannot on the evidence as matter of law be imputed to him. *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554. Nor would his neglect to look or to listen for a car, as he at first testified, have been conclusive. *Hennessey v. Taylor*, 189 Mass. 583. It still remained under either assumption a question of fact whether in the judgment of the jury his conduct evidenced the lack of such care as boys of his age, capacity and experience should be required to exercise. *Butler v. New York, New Haven, & Hartford Railroad*, 177 Mass. 191, 192, 193. *Callahan v. Dickson*, 210 Mass. 510. *Chiuccariello v. Campbell*, 210 Mass. 532. The present case is clearly distinguishable from cases where children while using the public ways as pedestrians with knowledge of dangerous conditions have been injured in attempting to pass in front of an oncoming car without taking any reasonable precautions to avoid it. *Stackpole v. Boston Elevated Railway*, 193 Mass. 562. *Holian v. Boston Elevated Railway*, 194 Mass. 74. See also *Russo v. Charles S. Brown Co.* 198 Mass. 473. The denial of the request was right.

The defendant undoubtedly was entitled to have the jury instructed as to the rule of law by which they were to be guided in passing upon the question of the plaintiff's due care. *Woodbury v. Sparrell Print*, 198 Mass. 1. The entire charge, however, is not reported. It must be presumed in the absence of any statement to the contrary that full and appropriate instructions were given, and, if so, the portion excepted to went no further than to leave to the jury whether under the circumstances to which

the judge specifically referred the plaintiff had been shown to have been negligent. But, even on the defendant's assumption that a question of law was submitted, the jury having decided the question rightly, it has not been prejudiced. *Rogers v. Abbot*, 206 Mass. 270, 274.

Exceptions overruled.

MARY C. MOONEY vs. JOHN MOONEY.

Hampden. September 24, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Practice, Civil, Appeal. Marriage and Divorce.

Upon a petition for the enforcement of decrees for alimony in a suit for divorce in which certain savings banks summoned by trustee process had been charged as trustees, a petition of an adverse claimant was filed alleging that the libellee had been adjudged a spendthrift and that the claimant had been appointed his guardian and claiming as such guardian the money of the libellee in the hands of the trustees. The answers of the trustees alleged that they had had notice of the appointment of the claimant as guardian and of his claim before the service upon them of the trustee process. On evidence, which was not before this court, a judge of the Superior Court made a decree that the claimant was entitled to the funds in the hands of the trustees. On an appeal by the libellant, it was *held*, that this court could not say that the decree was not justified by the evidence not before them, and that it was not necessary to decide whether in such a proceeding the rights of an intervenor ought to be considered, because it did not appear that any objection on this ground had been made in the court below.

PETITION, filed in the Superior Court on July 13, 1910, for the enforcement of decrees for alimony in a suit for divorce, in which the Berkshire County Savings Bank and the City Savings Bank, both in Pittsfield, had been summoned by trustee process and had been charged as trustees. On July 29, 1910, a petition was filed by Mary E. O'Brien as adverse claimant, alleging that the libellee had been adjudged a spendthrift and that she had been appointed his guardian, and claiming as such guardian the money of the libellee in the hands of the trustees. The answers of the trustees alleged that they had had notice of the appointment of the claimant as guardian and of her claim before the service upon

them of the libellant's attachment by trustee process. On June 6, 1911, *Hitchcock*, J., made a decree that Mary E. O'Brien as guardian was entitled to the funds in the hands of the trustees as disclosed by their answers, that the trustees be discharged and that no costs be allowed to any of the parties. The libellant appealed.

In this court the claimant and the trustees filed a motion to dismiss the appeal, contending that the libellant had lost her right to appeal by a failure to prosecute a previous appeal from a similar decree alleged to have been made by the Superior Court on December 29, 1910.

H. A. Buzzell, for the libellant.

P. J. Moore, for the claimant and the trustees.

HAMMOND, J. This is an appeal from a decree of the Superior Court. The decree, after reciting that the cause came on to be heard upon the question of the claim of the adverse claimant to funds in the hands of the trustees, orders and adjudges that the claimant is entitled to the funds in the hands of the trustees, that the trustees be discharged, and that no costs be allowed to either party. The appeal is properly here, and the motion of the appellee that it be dismissed is disallowed.

The evidence upon which the findings were made and which justifies the decree is not before us. It is true that the record shows the answers of the trustees, but there is nothing in the previous proceedings nor in the answers which is conclusively inconsistent with the decree. See *Downs v. Flanders*, 150 Mass. 92, and cases cited. The evidence not being all before us we cannot say as matter of law that the decree is not justified by it.

The appellant contends that the rights of an intervenor ought not to be considered in such a proceeding. See *Hill v. Hill*, 196 Mass. 509, *ad finem*. It does not appear, however, that any such objection was made below, and the appellant having gone to trial without raising the question there cannot for the first time raise it here.

Decree affirmed.

MANUEL OJALA vs. AMERICAN STEEL AND WIRE COMPANY.

Worcester. September 30, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability.

In an action by a workman in a wire mill against his employer, there was evidence that the plaintiff was a green hand twenty-one years of age who had been at work only two weeks before the accident, that he was working as helper to the operator of a machine and was told by the operator to clean it, that the machine then was running, but that the operator had stopped the motor and that the machine would run from three to six seconds after the motor was stopped, that the plaintiff proceeded to use a handful of waste in wiping some oil off the bed of the gears, which were only six and five eighths inches above it, when the waste caught in the gearing and the plaintiff's fingers were drawn into the gearing and crushed. *Held*, that there was no occasion for the defendant to warn the plaintiff against the danger of cleaning the machine while in motion, and therefore that the defendant's failure to do so was not evidence of negligence.

TORT for personal injuries sustained by the plaintiff on July 30, 1910, when he was employed as a helper in the wire mill of the defendant at Worcester. Writ dated September 23, 1910.

In the Superior Court the case was tried before *Irwin, J.* The facts which could have been found upon the plaintiff's evidence are stated in the opinion. The defendant offered no evidence, and at the request of the defendant the judge ruled that upon all the evidence the plaintiff could not recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

M. M. Taylor, for the plaintiff.

F. F. Dresser, for the defendant.

LORING, J. In this case the fingers of the plaintiff's right hand were drawn into the gearing of a machine which he was cleaning while it was in motion. He was working as helper to the operator of the machine and had been told by the operator to clean it. The operator testified that "the machine was running when . . . [he] . . . told . . . [the plaintiff] . . . to go and clean it, but . . . [he] . . . had stopped the motor before;" and there was evidence that the machine would run from three to six seconds after the motor was stopped. At the time of the acci-

dent the plaintiff was using a handful of waste in cleaning the machine and was wiping some oil off the bed under the gears. There was a space of only six and five eighths inches between the bottom of the lower gear and the bed. The jury were warranted in finding that the waste which the plaintiff held in his hand caught in the gearing and his fingers were in that way drawn into the gearing and crushed. There was evidence that three of the teeth of the lower wheel of the gearing were broken and had been so for a long time; and there was some evidence that the gearing while in motion made a slight current of air underneath. The plaintiff was a green hand twenty-one years of age and had been at work but two weeks before the accident.

This evidence did not warrant a finding of negligence on the part of the defendant. The defendant had no reason to anticipate that the plaintiff would be asked by his fellow workman to clean the machine while it was in motion, if indeed the jury could have found that the operator did ask him to do so, or that the plaintiff would undertake to do that of his own accord. There was no occasion therefore for the defendant to warn the plaintiff against the danger of so doing. The case is within *De Angelo v. Boston Elevated Railway*, 209 Mass. 58. See also *Leistritz v. American Zylonite Co.* 154 Mass. 382; *Sullivan v. Simplex Electrical Co.* 178 Mass. 35; *Chmiel v. Thorndike Co.* 182 Mass. 112; *Buston v. Harvard Brewing Co.* 183 Mass. 438.

Exceptions overruled.

HAROLD K. BULLARD, executor, *vs.* MARY J. LEACH & others.

Worcester. September 30, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Devise and Legacy, Identification by extrinsic evidence, Specific legacy. *Evidence*, Extrinsic affecting writings.

Where a will provided that certain legacies should be paid from the money of the testatrix deposited in three savings banks named in the city of Worcester, and one of those named was the Worcester Five Cents Savings Bank, it can be shown by extrinsic evidence that the testatrix never had a deposit in the Worcester Five Cents Savings Bank but that at the time of making her will and at

the time of her death she had a deposit in the Worcester County Institution for Savings, which was not named in the will, as well as deposits in the other two savings banks named, and it can be found that the testatrix intended to designate, instead of the Worcester Five Cents Savings Bank, the Worcester County Institution for Savings.

A will made ten pecuniary legacies and then provided as follows: "The last ten legacies aforesaid are to be paid only out of the monies now deposited in" three savings banks designated. At the time of making the will and at the time of her death the testatrix had deposits in the three savings banks designated, amounting in all to a little more than the amount of the ten legacies. *Held*, that the ten legacies were specific and not general legacies.

APPEAL from a decree of the Probate Court for the county of Worcester, allowing, after certain amendments, the first and final account of Harold K. Bullard as executor of the will of Sarah L. Fisher, late of Milford.

The appeal was heard by *Rugg*, C. J. The will of Sarah L. Fisher, with the omission of the introductory and attesting clauses and the clause nominating the executor, was as follows:

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:

"To Emma F. Bullard and Harold K. Bullard, all of my real estate in equal shares; also, all my money deposited in the Milford Savings Bank, Milford, Mass., in equal shares.

"To the Pine Street Baptist Church of Milford, Mass., three hundred dollars.

"To my sister, Lucy S. Brown of Webster, Mass., one hundred dollars.

"To my sister in law, Abbie D. Tourtellotte, of Worcester, Mass., fifty dollars.

"To my niece, Anna S. Loud, fifty dollars, if living at my decease.

"To my niece, Mary J. Leach, fifty dollars, if living at my decease.

"To my niece, Elizabeth Hazard, fifty dollars, if living at my decease.

"To my niece, Ida M. Brown, fifty dollars, if living at my decease.

"To my niece, Martha J. Morris, fifty dollars, if living at my decease.

"To my niece, Mary L. Nichols, fifty dollars, if living at my decease.

"To my niece, Alice McGowan, fifty dollars if living at my decease.

"The last ten legacies aforesaid are to be paid only out of the monies now deposited in the Worcester Mechanics Savings Bank, the Worcester Five Cents Savings Bank, and the People's Savings Bank, in Worcester, Mass.

"To the said Emma F. Bullard and Harold K. Bullard, all the rest and residue of my estate, in equal shares."

The testatrix died on August 16, 1908. Her will was dated May 13, 1904.

At the date of her will the testatrix had on deposit in the Peoples Savings Bank \$201.95, in the Worcester Mechanics Savings Bank \$218.79 and in the Worcester County Institution for Savings \$440. All three were savings banks in the city of Worcester. She also had a deposit in the Milford Savings Bank. The total amount to be treated as deposited in the three Worcester savings banks at the time of her death was \$805.89. The ten legacies which the will provided should be paid out of deposits in the savings banks in Worcester amounted to \$800. The testatrix never had any deposit in the Worcester Five Cents Savings Bank. At the time of her death she had in the Worcester County Institution for Savings \$521.06.

The Chief Justice found as a fact that in the clause of the will providing "that the last ten legacies aforesaid are to be paid only out of the monies now deposited in the Worcester Mechanics Savings Bank, the Worcester Five Cents Savings Bank, and the People's Savings Bank, in Worcester, Mass.," the testatrix intended, instead of the Worcester Five Cents Savings Bank, to designate the Worcester County Institution for Savings.

The debts of the estate and the expenses of administration amounted to \$589.05. The amount of the deposit in the Milford Savings Bank at the date of the death of the testatrix was \$1,315.94, and the value of the real estate devised under the will was \$2,100. In addition to the deposits in the Milford Savings Bank and in the three Worcester savings banks and the real estate devised, which could be applied to the payment of said indebtedness of the estate and the expenses of administration, there had come into the hands of the executor the additional sum of \$125.01.

The account of the executor treated the legacy of the deposit of \$1,315.94 in the Milford Savings Bank to Emma F. Bullard and Harold K. Bullard as a specific legacy, but treated the ten legacies payable out of the money in the three savings banks in Worcester as general legacies and deducted proportionally from them sufficient sums to make up the deficiency in the amount required for the payment of debts and charges of administration. The decree of the Probate Court treated the ten legacies above referred to as specific legacies, and required the amendment of the executor's account by making the specific legacy to Emma F. Bullard and Harold K. Bullard and the other ten specific legacies equally subject to the payment of the amount required for the payment of debts and charges of administration. Harold K. Bullard as executor of the will of Sarah L. Fisher appealed from the decree.

The Chief Justice reserved the appeal for determination by the full court upon agreed facts and the inferences that properly might be drawn therefrom, such decree to be entered as law might require.

• *W. C. Mellish*, (*C. A. Cook* with him,) for the appellant.

G. R. Stobbs, for the appellees.

BRALEY, J. The testatrix at the date of the will and of her death had no money deposited in the Worcester Five Cents Savings Bank, which is enumerated among the savings banks in the second clause, but she did have a deposit in the Worcester County Institution for Savings. It is the first contention of the appellant that extrinsic evidence was not admissible to show a misdescription and that the testatrix intended to designate the latter, instead of the former, bank.

A literal interpretation would defeat her express purpose of giving the moneys in three savings banks doing business in a certain municipality to the legatees named, and her intention, which must govern, may be evidenced by all the circumstances concerning the nature and place of deposit of the specific property bequeathed. The identity of the banks could thus be shown as well as the identity of the legatees where upon applying the will doubt arises from the name or description as to the person or persons who the testator intended should share in his estate. The provisions of the will are unchanged, but it is to be read and applied in the light of the facts under which the testatrix is presumed to

have acted. *Tucker v. Seaman's Aid Society*, 7 Met. 188, 205, 206. *Metcalf v. Framingham Parish*, 128 Mass. 370. *Hinckley v. Thatcher*, 139 Mass. 477. *Tomlinson v. Bury*, 145 Mass. 346, 348. *Thissell v. Schillinger*, 186 Mass. 180. *Best v. Berry*, 189 Mass. 510.

It next is contended that the legacies given by this clause are general, and, there having been an insufficiency of assets, the amount in the banks, which the parties agree would have been sufficient at her death to have paid the legacies, could be used by the executor for the payment of debts and the charges of administration until it had been exhausted.

The purpose of the testatrix, however, is plain to give these deposits in the proportions specified; and if the total amount had proved to be inadequate, no direction is found for their payment from the residue of the estate, and the bequest is to be read as if she had said, "My moneys deposited in these banks are to be divided between the legatees," stating the sum each should receive. A particular fund or portion of her estate having been set apart and appropriated with no further provision for their payment, the legacies cannot be treated as general or demonstrative, but should be classed as specific. *White v. Winchester*, 6 Pick. 48. *Wilcox v. Wilcox*, 13 Allen, 252, 256. *Towle v. Swasey*, 106 Mass. 100, 106. *Farnum v. Bascom*, 122 Mass. 282, 285. *Johnson v. Goss*, 128 Mass. 433, 435, 436. *Boston Safe Deposit & Trust Co. v. Plummer*, 142 Mass. 257, 262. *Harvard Unitarian Society v. Tufts*, 151 Mass. 76, 78. *Porter v. Howe*, 173 Mass. 521, 526. *Thayer v. Paulding*, 200 Mass. 98. *Armstrong's appeal*, 63 Penn. St. 312, 316.

The gift to the appellant and his wife in the first clause of "all my money deposited in the Milford Savings Bank" is also specific. *Towle v. Swasey*, 106 Mass. 100. And although they are named as residuary devisees and legatees, the remainder of the estate, after the pecuniary legacies and the previous devise to them of "all of my real estate in equal shares" have been satisfied, is trifling. But, while if necessary all of the property must be applied in payment of the testatrix's debts and to defray the expenses of settling the estate, it appears from the agreed facts that only a portion of the personal property will be required. The specific legatees therefore must contribute to the deficiency in proportion

to the amounts of their respective gifts. *Farnum v. Bascom*, 122 Mass. 282. *Richardson v. Hall*, 124 Mass. 228, 233; *S. C.* 127 Mass. 64. R. L. c. 135, §§ 26, 27.

The questions presented by the appellant are disposed of by what we have said, and, the computations of the account as allowed not being in dispute, the decree of the Probate Court should be affirmed.

Ordered accordingly.

SMITH AND RICE COMPANY *vs.* JAMES W. CANADY.

Worcester. September 30, 1912. — November 26, 1912.

Present: RUGG, C. J. MORTON, LORING, BRALEY, & DECOURCY, JJ.

Contract, Performance and breach. Tender. Equity Jurisdiction, Specific performance.

An attempted revocation of a contract, which attempt afterwards is abandoned when the other party insists on performance, cannot be treated as a refusal of performance that relieves the other party from his obligation to perform his part of the contract.

In a suit for specific performance it appeared that the defendant, by an instrument under seal dated March 9 in a certain year, agreed to sell his farm to the plaintiff for a price named and to deliver a deed of it on or before April 10 on payment of the purchase money, that on March 17 the defendant sent to the plaintiff an attempted revocation in writing, that about April 1 the defendant at the plaintiff's request went to the office of the plaintiff's attorney, where the plaintiff demanded a deed of the farm and the defendant replied that he was not bound to deliver a deed before April 10, that the plaintiff then asked the defendant to remain a short time until the plaintiff could procure money to make a tender, that the defendant refused to wait and left the office, that thereafter the defendant caused a proper deed of the farm to be prepared and on April 10 remained at his dwelling house during the entire day ready and able to deliver possession of and title to the farm in accordance with his agreement, but that the plaintiff did not then or at any time thereafter before the filing of the bill demand a deed of the farm or tender or offer to tender the purchase money. A decree was made dismissing the bill. *Held*, that the bill was dismissed properly, the plaintiff never having made a tender of the purchase money, and there having been no such refusal to convey on the part of the defendant as to dispense with a tender.

MORTON, J. This is a bill in equity to compel specific performance by the defendant of the following agreement under seal:

"I agree to sell and convey, by warranty deed conveying a good title, free from all incumbrances, to Smith & Rice Co., Corporation, of Worcester, Massachusetts, for the sum of thirteen hundred dollars, the following described property: the farm on which I now live in Spencer, Mass., known as the McKonik farm the deed of which recorded in Worcester District Deeds, Book 1875, Page 307. Also all wood cut on farm and in shed at house and what hay may be left in the barn. Possession of said premises and a deed of the same shall be delivered to the said Smith & Rice Co. on or before the tenth day of April, 1911. Payment of the purchase money shall be made upon delivery of the deed. Witness my hand and seal this 9th day of March, 1911.

"Witness

James W. Canady. (Seal.)"

The case was duly heard and a decree* was entered dismissing the bill without costs. The plaintiff appealed.

It appeared that shortly after the defendant signed the agreement he attempted to revoke the offer contained in it by means of the following letter which was sent by him to and received by the plaintiff:

"Spencer, Mar. 17th, 1910.

"Mr. Rice

"Dear Sir I give you notice that I do hereby revoke my offer to sell to you my farm in Spencer. You don't agree to buy it nor do you give me a penny or other thing to hold it until you find out whether you want it or not and at the last moment you can tell me you don't want it and I lose other customers. That is not fair or right.

"Yours

"J. W. Canady."

The letter appears to be dated 1910, but that is obviously a mistake for 1911. The judge found that the attempted revocation contained in this letter was abandoned and given up by the defendant some time about April 1, 1911. The facts found by the judge warranted such a finding. What was found by the judge was that "Sometime about April 1, 1911, at the request of the plaintiff, the defendant went to the office of the plaintiff's attorney,

* Made by *Pierce, J.*

and while there discussed with the plaintiff the matter of the conveyance; was asked by the plaintiff then to execute and deliver a deed of the premises, to which demand the defendant replied that he was not bound to do such [so] under his agreement before the tenth day of April, 1911. The plaintiff then requested the defendant to remain a short while until he, the plaintiff, could procure at a nearby bank money sufficient to make a tender. This request the defendant refused to comply with and left the office." It also appeared that the defendant thereafter caused a proper deed of conveyance to be prepared and remained at his dwelling house on the premises the entire day on the tenth of April, ready and able to deliver possession and title in accordance with his offer. These facts plainly warranted a finding that the attempted revocation had been abandoned and given up by the defendant, and that the plaintiff must have so understood it and was bound to govern itself accordingly.

The offer made by the defendant required the plaintiff to tender on or before April 10 the amount for which the defendant agreed to sell and convey the farm. What took place in the office of the plaintiff's attorney plainly did not constitute a tender, and the judge found that "The plaintiff thereafter, before the bringing of this bill, never made demand upon the defendant for a deed of the premises, nor tendered nor offered to tender the price to be paid for such conveyance." The time named in the offer was of the essence of the agreement made by the defendant, and even if what took place in the attorney's office could be construed as an acceptance by the plaintiff of the defendant's offer the plaintiff was bound to tender performance on its part before the expiration of the time named, in order to entitle itself to a conveyance of the farm. As already observed, it is clear that what took place in the attorney's office did not constitute a tender, and it is expressly found that thereafter, before the bringing of the bill, the plaintiff made no demand for a deed and did not offer to pay the price required for a conveyance.

There was no such refusal to convey on the part of the defendant as to dispense with a tender. *Mengis v. Carson*, 114 Mass. 410. The attempted withdrawal of the offer was abandoned, not only without objection so far as appears on the

part of the plaintiff, but in consequence, as it could have been found, of his holding the defendant to his offer and of the defendant's recognizing that he was bound to convey if the plaintiff insisted upon his doing so and complied with the conditions on which the offer was made. As was said in *Mengis v. Carson, supra*, "A mere declaration of unwillingness which shows only a passing intention on the part of the defendant of which he may repent, and which does not amount to an assurance that the other party is relieved from the part required of him," does not excuse the plaintiff from performing such part. The defendant's recognition of his obligation to convey if the plaintiff insisted upon it was shown by his statement to the plaintiff, when the plaintiff asked for a deed, that he was not bound to give a deed till April 10, and by the fact that he caused a proper deed to be prepared and was ready and able to give title and possession on the tenth day of April. There was nothing to excuse the plaintiff from a proper tender on or before the tenth day of April, and the plaintiff not having made such tender was not entitled to a conveyance and the bill was rightly dismissed.

Decree affirmed with costs of appeal.

The case was submitted on briefs.

M. M. Taylor & E. B. Johnson, for the plaintiff.

A. G. Buttrick, O. L. Stone & W. S. Duncan, for the defendant.



DANIEL HICKEY, executor, *vs.* CITY OF WORCESTER.

Worcester. October 1, 1912. — November 26, 1912.

Present: MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Negligence, Employer's liability, In use of explosives.

In an action against a city under the employers' liability act for causing the death of a workman, who was assisting in the blasting of a rock with dynamite in excavating for a sewer and who had had many years of experience at such work, it appeared that holes for the blasting had been drilled in the rock, into each of which had been put dynamite fitted with an exploder, and that one set of electric wires was used to explode the dynamite in all of the holes simul-

taneously; that after an explosion and before the debris was removed the only way to ascertain whether the dynamite in all of the holes had been exploded was by the condition of the rock; that while the workman in question was clearing away the debris after a blast, when the condition of the rock indicated that all of the dynamite had been exploded, there was an explosion of one piece of dynamite that had been left unexploded. There was no evidence that there was any better exploder in the market than that used by the defendant. *Held*, that the accident was caused by a danger incident to the work which the workman was employed to perform.

In an action against a city under the employers' liability act for causing the death of a workman who was assisting in blasting a rock with dynamite in excavating for a sewer, it appeared that dynamite had been placed in several holes drilled in the rock and had been fitted with exploders to be set off by the use of a single set of electric wires; that the exploder used in one hole had failed to work, and that later the dynamite in this hole had exploded, causing the accident; that the defendant had been using in its work two kinds of exploders, both of which had given trouble by not always exploding. At the time of the accident the defendant was out of one of the kinds, which the foreman in charge preferred, and the other kind was being used. There was no evidence that there was any better exploder in the market than the two kinds in use by the defendant. *Held*, that there was no evidence of negligence of the defendant in failing to provide a suitable exploder.

Permitting a workman in the employ of a city, who is assisting in clearing away debris caused by the blasting of a rock with dynamite in excavating for a sewer, to work until twenty minutes after four on the afternoon of the eighth of December, even if the workman had only one eye, is not in itself evidence of negligence toward the workman on the part of the superintendent in charge of the work.

TORT, under R. L. c. 106, § 71, cl. 1, 2, § 72, for the conscious suffering and death of the plaintiff's testator Francis H. Early, alleged to have been caused by an explosion of dynamite while he was in the employ of the defendant assisting in excavating for a sewer. Writ dated December 3, 1906.

In the Superior Court the case was tried before *Sanderson, J.* Material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

J. A. Thayer, C. B. Perry & P. D. Howard, for the plaintiff.

E. H. Vaughan & C. S. Anderson, for the defendant.

LORING, J. The facts disclosed by the plaintiff's evidence were substantially as follows: At about twenty minutes after four o'clock in the afternoon of December 8, 1905, the plaintiff's testator with some five or seven other men was at work in a trench removing the debris caused by a blast, when the dynamite in one of

the holes exploded and caused the injuries here complained of. The blast in question had consisted of nine holes; the explosive used was dynamite, and the dynamite was exploded by a cartridge or an exploder put in the dynamite in each hole. One set of electrical wires was used, which connected with each and all the exploders. The condition of the rock after the accident indicated that all of the nine holes had exploded. As the explosions in all the holes that explode are simultaneous, this is the only way of ascertaining, before the debris is removed, whether it is probable that all the holes have exploded. The plaintiff's testator was a workman of many years' experience in blasting; earlier on the same day he had found that the hole next but one to the hole here in question had not exploded, had cut the wires and removed the exploder and the sticks of dynamite originally put in the hole. The foreman of the gang to which the plaintiff's testator belonged and an engineer (who was assistant to the superintendent of sewers and who had charge of sewer construction work in the defendant city) both testified that before this accident they had had trouble with both kinds of electrical exploders used by the defendant city in setting off dynamite blasts, and the foreman testified that he had told the engineer that he preferred the brand not furnished him. It appeared that the defendant did not furnish this kind of exploder for the blast in question, because it was out of exploders of that brand at the time.

It is manifest that the injuries of the plaintiff's testator were caused by a danger incident to the work which he was employed to perform. See *Allard v. Hildreth*, 173 Mass. 26. Although there was evidence that the defendant had had trouble with both brands of exploders used by it, there was no evidence that there were any better exploders in the market than these two, and the preference of the foreman for the other brand when trouble had been had with both did not warrant a finding that the city was negligent in using the brand it furnished for this job. This would be so even if the foreman had testified that the reason for his preference was that exploders of this brand were more certain to explode than those of the other brand, and it is to be noted that the foreman did not so testify.

The foreman in his testimony threw out the suggestion that "The trouble was if it was getting along dusk in the afternoon

he couldn't see just as any other man with only one eye. If been another eye perhaps he would have seen this and avoided the accident altogether." But letting an experienced man continue this work until twenty minutes after four in the afternoon on the eighth day of December, even if he had but one eye, would not warrant a finding of negligence. The entry must be
Exceptions overruled.

ELIJAH F. TEMPLE vs. FRED E. BENSON.

Berkshire. October 14, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Deed, Construction.. Boundary. Evidence, Extrinsic affecting writings.

When on the face of a deed of land no uncertainty is disclosed as to the monuments or boundaries described, but the description is shown to be ambiguous when it is applied on the land to the monuments referred to, extrinsic evidence is admissible to show what boundaries the language of the deed was intended to describe.

PETITION, filed in the Land Court on September 8, 1910, for the registration of the title to certain land on East Quincy Street in North Adams.

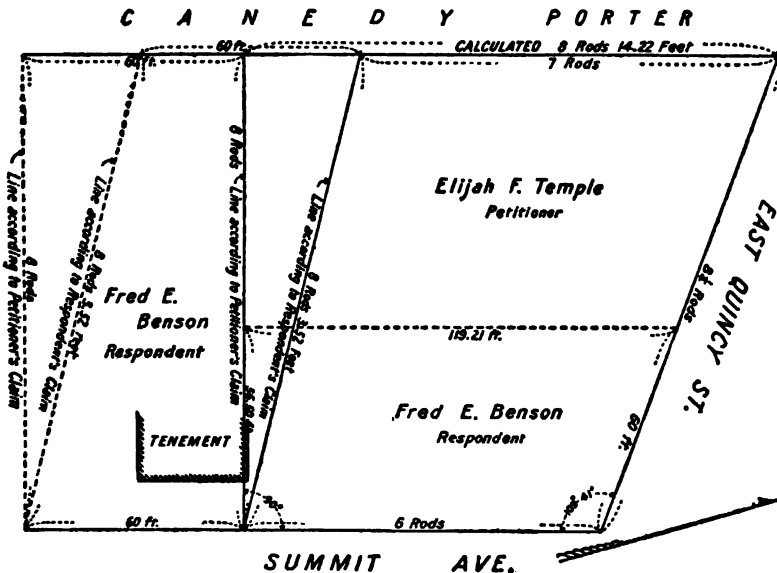
In the Land Court the case was heard by *Davis, J.* The only issue at the trial was the position of the southerly line of the petitioner's land as shown on the sketch on the next page.

In 1870 one Sylvester A. Kemp owned land which included the locus and land immediately east and south of it shown on the plan as land of the respondent, and conveyed to one Josiah Tinney the locus and the lot east of it by a deed with the following description: "Situate near the North Village of North Adams, bounded and described as follows, to wit: Commencing on the south side of East Quincy Street, so called, at the point of its intersection with Mechanic Street (now Summit Avenue), so called; thence south 12 degrees west on the west side of a contemplated street, six rods to a stake and stones; thence westerly eight rods to land of J. M. Canedy; thence northerly on lands of J. M. Canedy and

Mrs. Porter seven rods to East Quincy Street; thence easterly on the south side of said street, about eight and one-fourth rods, to the place of beginning."

The same premises were conveyed by four mesne conveyances to one Samuel Vadner, who received them in 1885, all the deeds containing the same description as that given above.

In 1887 Kemp conveyed to the respondent land south of that previously described, by a deed containing the following descrip-



tion: "Beginning on the west side of Summit Avenue, at the southeast corner of land of Samuel Vadner, running westerly on the south line of said Vadner's land, eight rods to land of Charles Tower (formerly of J. M. Canedy); thence southerly on said Tower's land, sixty feet; thence easterly eight rods to Summit Avenue; thence northerly on the west side of Summit Avenue, sixty feet to the place of beginning."

On June 1, 1890, Vadner conveyed to the respondent the lot east of the locus by a deed with the following description: "Commencing at the northeast corner of lands of said Benson, on the west side of Summit Avenue; thence running northerly on the west line of Summit Avenue, about six rods to East Quincy Street;

thence westerly on East Quincy Street, sixty feet to stake and stones; thence southerly on line parallel with the first mentioned line, about six rods, to land of said grantee; thence easterly on land of said Benson, sixty feet to place of beginning."

In 1894 Vadner conveyed the locus to the petitioner by a deed containing the following description: "Beginning on the south side of East Quincy Street, so called, at a point of its intersection with Mechanic Street (now Summit Avenue), so called; thence south twelve degrees west, on the west side of a contemplated street, six rods to a stake and stones; thence westerly eight rods, to land formerly owned by J. M. Canedy; thence northerly on said land and land of Mrs. Porter, seven rods to said East Quincy Street; thence easterly on the south side of said street, about eight and one-fourth rods to place of beginning, except what I have sold pertaining to this lot of land to Fred E. Benson, of said North Adams, with deed dated June 1st, 1890."

In 1870 neither East Quincy Street nor Summit Avenue was a public street. Kemp had opened East Quincy Street as a private way. After 1879 both streets were public streets, East Quincy Street being two rods wide. The bill of exceptions states: "The point of intersection of East Quincy Street, and Mechanic Street, or Summit Avenue, in July, 1870, was agreed to as the point marked on the annexed sketch, at the northeast corner of the lot at the intersection of East Quincy Street and Mechanic Street and has never been changed and is the point of intersection of the south line of East Quincy Street and west line of Summit Avenue, as laid out by the City of North Adams, in 1879."

The westerly boundary line of the locus was fixed by a stone wall which was parallel to Summit Avenue.

The petitioner contended that the southerly line of East Quincy Street as laid out by North Adams was in a different location from the southerly line of East Quincy Street as it was understood to be before that time. The respondent contended that that line had not been changed. Both parties offered evidence in support of their contentions.

The judge ruled as follows, subject to an exception by the respondent: "The description in the petitioner's deed cannot as a physical matter be literally applied in all its details to the ground. If the westerly end of the southerly line be taken as contended for

by the respondent at a point on the Canedy land distant exactly seven rods from the southerly line of East Quincy Street, then the southerly line will exceed eight rods in length. If on the other hand the westerly end of said southerly line be taken at a point on the Canedy land distant exactly eight rods from its point of departure, on the westerly line of Summit Avenue, then the westerly line on land of Canedy and Porter will exceed seven rods in length. . . . I rule that the deed is ambiguous."

Subject to an exception by the respondent, the judge admitted in evidence, "so far as it tended to show the location of East Quincy Street," a deed by Kemp to one Frost dated in 1872. According to the description in the deed, the north line of East Quincy Street extended over the east side of Summit Avenue and ran south 79° east, and the street was three rods wide through the land of Porter.

Subject to a further exception by the respondent, the judge allowed Tinney, called by the petitioner, to testify "that at the time he bought his land, previously described, from Kemp and before the deed was drawn, he went on the ground with Kemp; that they began at the northeast corner of the lot he was to buy, at the corner of Summit Avenue and East Quincy Street, and measured south on Summit Avenue, six rods; that from there they turned a right angle, because Kemp stated he wanted 'to measure at right angles so that all the lots would come square,' and measured eight rods to the old stone wall on Canedy land; that they then measured down the line of Canedy land seven rods and stopped there, in order, Kemp said, to leave room for a street, Kemp stating he might throw the street to the north or to the south, and that he would deed by the street so that if the street went to the north Tinney would be the gainer; that the measurements stopped about one rod short of the nearest wheel track, and that two or three days later the deed was drawn, executed and delivered."

The judge found for the petitioner; and the respondent alleged exceptions.

The case was submitted on briefs.

M. E. Couch, for the respondent.

J. F. Noxon & M. Eisner, for the petitioner.

BRALEY, J. The petitioner by mesne conveyances and the

respondent by direct grant derive title to their respective lands which are contiguous on the south from a common grantor Sylvester A. Kemp, and as the duly recorded deed from him to Joseph Tinney under whom the petitioner claims, antedates his deed to the respondent, it follows upon comparison of the descriptions, that when the position of the disputed southerly line of the petitioner's lot has been ascertained the northerly line of the respondent's lot also will have been defined, and the controversy determined.

It is a familiar rule in the construction of deeds, that, where the land conveyed is described by courses and distances and also by monuments which are certain or capable of being made certain, the monuments govern, and the measurements if they do not correspond must yield. *Howe v. Bass*, 2 Mass. 380. *Pernam v. Wead*, 6 Mass. 131. *Mann v. Dunham*, 5 Gray, 511, 514. *George v. Wood*, 7 Allen, 14. *Morse v. Rogers*, 118 Mass. 572, 578. *Percival v. Chase*, 182 Mass. 371. In its application natural or permanent objects, such as streams or rivers and the shore of the sea, or highways or other lands, or artificial land marks or signs such as fences, walls, a line, a building, or a stake and stones, are to be treated as monuments or boundaries. *Storer v. Freeman*, 6 Mass. 435. *King v. King*, 7 Mass. 496. *Flagg v. Thurston*, 13 Pick. 145. *Whitman v. Boston & Maine Railroad*, 3 Allen, 133. *Paine v. Woods*, 108 Mass. 160. *Boston v. Richardson*, 13 Allen, 146. *Needham v. Judson*, 101 Mass. 155. *Pernam v. Wead*, 6 Mass. 131. *Smith v. Smith*, 110 Mass. 302. *Charlestown v. Tufts*, 111 Mass. 348. *Frost v. Angier*, 127 Mass. 212. And their identity may be established by extrinsic evidence. *White v. Bliss*, 8 Cush. 510, 512. The only exception recognized is, where, by strict adherence to monuments, the construction is plainly inconsistent with the intention of the parties as expressed by all the terms of the grant. *Davis v. Rainsford*, 17 Mass. 207. *Murdock v. Chapman*, 9 Gray, 156. *George v. Wood*, 7 Allen, 14.

The petitioner had the burden of proving himself entitled to registration of the premises as described in the application. *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542.

On the face of the deed no uncertainty as to the distances or the location of the monuments or boundaries is disclosed, yet upon applying the description to the land it became apparent that the

southerly line must run at a right angle westerly from the stakes and stones in the west side of Summit Avenue "to land formerly owned by J. M. Canedy" or the call for a distance of eight rods cannot be satisfied. But if, as claimed by the respondent, this line should run from the stake and stones to the Canedy land, the abuttal or boundary on the west, at a point distant seven rods from the south side of East Quincy Street, the boundary on the north, it would exceed eight rods, and the area of the petitioner's land called for by his deed would fall correspondingly short, as is clearly shown by the first sketch or plan forming part of the exceptions.

The parties agreed that, as marked on the plan, the starting point of the lot was the northeast corner at the intersection of East Quincy Street with Summit Avenue, which never had been changed, and the respondent's exception to the admission of the deed of Kemp to Pattie D. Frost would seem to have become immaterial. It was, however, properly admitted. At the date of the deed to Frost East Quincy Street, although a private way opened by the grantor was a boundary common to the land conveyed to her as well as to the tract, a part of which was later deeded to the respondent, and grants of adjacent premises even between strangers are admissible where the location of the land for which registration is sought is in dispute. *Sparhawk v. Bullard*, 1 Met. 95, 100. *Devine v. Wyman*, 131 Mass. 73.

The northerly boundary and point of beginning being certain, the easterly boundary was the west side of the avenue, measuring six rods to a stake and stones. The termini and length of the first course were thus fixed, and the stake and stones from which the second or southerly course starts locates and controls the easterly end. No further description is given, and the presumption is that this course, whatever the interior angle may be, ran straight to the land on the west, although it could not be deflected by parol evidence to a point north of the Canedy land. *Allen v. Kingsbury*, 16 Pick. 235. *Jenks v. Morgan*, 6 Gray, 448. *Hovey v. Sawyer*, 5 Allen, 554, 555. *Henshaw v. Mullens*, 121 Mass. 143. The angle of departure however is not given, and, as the southerly line claimed by each party is not irregular, but when projected extended directly from landmark to landmark, a material discrepancy in the measurement of the third or westerly course

would be caused whichever position is taken. A latent ambiguity, as the judge properly ruled, had been developed which could be removed only by proof of extrinsic facts. *Frost v. Spaulding*, 19 Pick 445. *Stone v. Clark*, 1 Met. 378. *Stevenson v. Erskine*, 99 Mass. 367. *Miles v. Barrows*, 122 Mass. 579. *Graves v. Broughton*, 185 Mass. 174. *Haskell v. Friend*, 196 Mass. 198. *Weeks v. Brooks*, 205 Mass. 458, 462, 463. Compare *Hall v. Eaton*, 139 Mass. 217.

It appears from the chain of title that Kemp, when the owner of the entire tract shown by the plan, first conveyed the portion lying northerly of the respondent's land to Joseph Tinney, and the declarations of Kemp to Tinney made while measuring the land, and contemporaneous with the giving of the deed, "that from there," meaning the stake and stones, "they turned a right angle because Kemp stated he wanted to measure at right angles so that all the lots would come square, and measured eight rods to the old stone wall on the Canedy land," was clearly admissible. *Abbott v. Walker*, 204 Mass. 71, 73. *Blake v. Everett*, 1 Allen, 248. *Davis v. Sherman*, 7 Gray, 291. The subsequent conveyance of Kemp to the respondent also shows a rectangular lot, and the description is confirmatory of the grantor's previously expressed purpose in fixing the shape of the lots, that the respondent's northerly line should run at a right angle with the westerly side of Summit Avenue, and not at an acute angle as the respondent contends.

The adverse finding of fact of which the respondent complains, that the southerly line should be established as contended for by the petitioner, having been warranted by the evidence, is conclusive, and the decision that the petitioner had the right to have his title confirmed and registered as described in the application shows no error of law. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89. R. L. c. 128, § 37.

Exceptions overruled.

COMMONWEALTH vs. ERNEST CORNELL.

Worcester. October 14, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Practice, Criminal, Verdict, Arrest of judgment. Pleading, Criminal, Indictment.

A verdict of not guilty on a count in an indictment charging the defendant with a violation of R. L. c. 208, § 98, in that he "did wilfully and maliciously administer" poison to "certain cattle belonging to" a certain person, is not inconsistent with a verdict of guilty on a second count in the same indictment charging the defendant with a violation of the same statute in that he "did wilfully and maliciously expose" poison "with intent that it should be taken or swallowed by cattle belonging to" the same person.

An objection that, in an indictment for a violation of R. L. c. 208, § 98, in exposing poison with intent that it should be swallowed by "cattle belonging to" a certain person, the word "cattle" is not sufficiently definite, even if it were a valid objection to the indictment, would not be a ground for arresting judgment after verdict, since it would be a cause existing before verdict which did not affect the jurisdiction of the court.

In an indictment charging that the defendant "did wilfully and maliciously expose certain poison . . . with intent that it should be taken or swallowed by cattle belonging to" a certain person, the word "cattle" is sufficiently definite to show a violation of R. L. c. 208, § 98, which in substance provides a penalty for administering or exposing poison with intent that it shall be taken or swallowed by "any horse, cattle or other beast of another person."

INDICTMENT, returned on August 17, 1910, in two counts, the first charging that the defendant "did wilfully and maliciously administer certain poison, to wit: — paris green to certain cattle belonging to Edward D. Leonard," and the second charging that the defendant "did wilfully and maliciously expose certain poison, to wit: — paris green, with intent that it should be taken or swallowed by cattle belonging to Edward D. Leonard."

R. L. c. 208, § 98, reads as follows: "Whoever wilfully and maliciously kills, maims or disfigures any horse, cattle or other beast of another person, or wilfully and maliciously administers or exposes poison with intent that it shall be taken or swallowed by any such beast, shall be punished by imprisonment in the State prison for not more than five years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than one year."

In the Superior Court the jury returned a verdict of not guilty on the first count and guilty on the second count. The defendant moved in arrest of judgment on the ground, in substance, that the verdicts on the two counts were inconsistent, and "that there is not any offense set forth in the second count in the indictment known to the laws of this Commonwealth." The motion was overruled, and on October 31, 1910, the defendant was sentenced to not less than three nor more than four years in the State prison, with one day of solitary confinement, and was committed. On November 29, 1910, the defendant appealed.

The case was submitted on briefs.

J. S. Richardson, for the defendant.

J. A. Stiles, District Attorney, & *E. T. Esty*, Assistant District Attorney, for the Commonwealth.

LORING, J. If the defendant exposed poison with intent that it should be swallowed but it was not swallowed by the cattle in question, the jury had to find a verdict of guilty on the second count and a verdict of not guilty on the first. There is no inconsistency between the two.

The other reason for arresting judgment was that "cattle" is not sufficiently definite. This was a cause existing before verdict not affecting the jurisdiction of the court and so not ground for arresting judgment. R. L. c. 219, § 38. *Commonwealth v. Monahan*, 170 Mass. 460.

It is not improper to add, however, that there is nothing in the objection. For while the word "cattle" may have been too indefinite under the black act, St. 9 Geo. I. c. 22, § 3, (*Rex v. Chalkley*, Russ. & Ry. 258) and at common law (*State v. Brookhouse*, 10 Wash. 87), it is not too indefinite under our criminal practice act. That act provides that a detailed description is not necessary (R. L. c. 218, § 17) and gives the defendant a right to a bill of particulars if the charge would not be otherwise fully, plainly, substantially and formally set out. R. L. c. 218, § 39. *Commonwealth v. Dill*, 160 Mass. 536. *Commonwealth v. Jordan*, 207 Mass. 259. Under that statute it is sufficient to charge this act in the words of the statute creating the crime. R. L. c. 208, § 98.

Judgment affirmed.

ALBERT F. LOVE vs. WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY.

Worcester. October 14, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Automobile. Negligence, In use of highway.

Under St. 1909, c. 534, §§ 2, 9, if the owner of an automobile which is not registered in his name operates it upon a highway, he is there unlawfully, and a street railway company in operating its cars upon the highway owes him no other duty than to abstain from injuring him by wantonness or recklessness.

TORT against a street railway company for personal injuries sustained by the plaintiff on July 10, 1910, from being run into by a car of the defendant on Main Street, a highway in Worcester, when the plaintiff was operating an automobile of which he was the owner. The declaration alleged that the street railway car was operated negligently and carelessly by the agents or servants of the defendant and that the plaintiff's injuries were caused by the negligence of the defendant. Writ dated March 16, 1911.

At the trial in the Superior Court before *Lawton, J.*, there was evidence of the plaintiff's due care and of the defendant's negligence.

The evidence showed that the plaintiff had procured a license to operate automobiles in 1905, and that he was experienced in their operation and mechanism and was perfectly competent to run them. At the time of the accident the plaintiff had failed to have his license renewed in accordance with St. 1909, c. 534, § 8, because he had been out of the Commonwealth. In the winter of 1909 the plaintiff had ordered a new automobile. While he was out of the Commonwealth the automobile was delivered at his residence in Worcester. His wife, who had a license to operate automobiles, had the automobile registered in her own name. The plaintiff returned to the Commonwealth only a few days before the accident. At the time of the accident he owned the automobile, which was not registered in his name but was registered in the name of his wife.

At the close of the plaintiff's evidence the judge ordered the jury to return a verdict for the defendant, on the ground that the automobile was not registered in the name of the owner. The judge reported the case for determination by this court with an agreement of counsel that, if this ruling was wrong, judgment should be entered for the plaintiff in the sum of \$150; otherwise, that judgment should be entered for the defendant.

The case was submitted on briefs.

P. T. Dolan, for the plaintiff.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

HAMMOND, J. At the time of the accident the automobile was not registered in the name of its owner. It was therefore unlawfully upon the highway, and the defendant owed to the plaintiff no other duty than that of abstaining from injuring him by wantonness or recklessness. The case is fully covered by *Dudley v. Northampton Street Railway*, 202 Mass. 443, and *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137.

Judgment for the defendant.

COMMONWEALTH vs. RAPHAEL BEAULIEU.

Bristol. October 28, 1912. — November 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Plumber. Pleading, Criminal, Complaint. Constitutional Law, Police power.

St. 1909, c. 536, § 4, provides that "No person shall do any work in plumbing which is subject to inspection, unless he has been registered or licensed as a journeyman plumber in accordance with the provisions of this act." A complaint charging violation of the statute alleged that the defendant "did . . . do certain work in plumbing which was subject to inspection, . . . [he] . . . not being then and there registered or licensed as a journeyman plumber in accordance with the provisions of" the statute. A motion to quash the complaint on the ground that it charged no offense known in law was overruled. *Held*, that the motion properly was overruled, since the statute set forth with precision and certainty all the elements necessary to constitute the offense and the complaint used the words of the statute.

St. 1909, c. 536, relating to the supervision of plumbing and providing among other things for the examination and licensing of master and journeyman

plumbers and for the punishment of persons who, without being licensed according to the provisions of the statute, perform any work in plumbing which is subject to inspection, is a reasonable exercise of the police power and is constitutional.

COMPLAINT, received and sworn to in the Third District Court of the County of Bristol on March 30, 1912, charging that the defendant on three different occasions "did . . . do certain work in plumbing which was subject to inspection, . . . [he] . . . not being then and there registered or licensed as a journeyman plumber in accordance with the provisions of" St. 1909, c. 536.

On appeal to the Superior Court, the case was tried before Fox, J. The defendant moved to quash the complaint "for the reason that no offense or offenses known in law are therein charged." The motion was overruled; and the defendant alleged an exception.

There was evidence introduced tending to show that the defendant was twenty-two years of age; that at the different times alleged in the complaint he was working for one Bolduc, a master plumber, who was duly licensed and also was the holder of a license as journeyman plumber, Bolduc placing him in different new houses to do plumbing work with the assistance of a helper; that much of this plumbing work was subject to inspection under the ordinances of New Bedford, where the houses were located and where the defendant worked; that the defendant was not licensed nor registered either as a journeyman plumber or as a master plumber; that the defendant had worked at the plumbing business for about five years and was trying to learn the trade of journeyman plumber; that he had taken examinations on four different occasions before the State board of examiners for plumbing licenses and had failed to pass each time; that Bolduc's duties were mostly overseeing the work of his various employees, who numbered twelve or fifteen persons and among whom there were from three to five men doing plumbing work, only one of whom was a licensed journeyman plumber; that the defendant on the days alleged in the complaint had been seen caulking joints, wiping joints and installing a fresh air vent pipe which extended from the cellar through the roof and connected with the various "traps," which was work subject to inspection; that Bolduc called upon the defendant once or twice a day, each call lasting

from one half hour to two hours, gave him directions as to how to perform his work and what should be performed, and later examined the work which had been performed; that afterwards, when all of the plumbing had been completed, examined and tested by Bolduc, it was re-examined and tested by an official of the board of health of New Bedford before the plumbing which had been performed by the defendant could be used; and that all plumbing before it was used by the owners or tenants was made to conform with the plumbing regulations and was inspected and approved by the official of the board of health as required by law.

At the close of the evidence the defendant made seventeen requests for rulings, of which the first twelve, the sixteenth and the seventeenth were based on an assumption that the defendant was an apprentice "or a person working under a verbal agreement for instruction." The thirteenth request was for a ruling that on all the law and the evidence the defendant was entitled to be acquitted, and the fourteenth and fifteenth were for rulings that St. 1909, c. 536, was unconstitutional. The judge refused to give any of the rulings asked for, and charged the jury that there was but a single question to be tried, namely, whether the defendant "did work in plumbing and without a license. Of course, it is agreed that he didn't have any license, and I understand that it is agreed that the business that he was engaged in, the kind of plumbing that he was engaged in, the putting together of soil pipe, was business that was subject to inspection. So if you accept the testimony, what is admitted by the defendant as to what he was doing, and the kind of work, and the way he was doing it with a helper, on his statement you would be clearly warranted, gentlemen, in finding that he committed the offense which is described in this complaint."

The jury found the defendant guilty; and the defendant alleged exceptions.

A. Auger, for the defendant.

J. T. Kenney, District Attorney, for the Commonwealth.

HAMMOND J. The motion to quash was rightly overruled. The general rule is that when the statute sets forth with precision and certainty all the elements necessary to constitute the offense intended to be punished, an indictment or complaint which uses the words of the statute is sufficient. *Commonwealth v. Barrett*,

108 Mass. 302, and cases cited. The rule is applicable to this complaint.

At the trial the evidence tended to show that the defendant, not being registered or licensed thereto as required by statute, did plumbing work which was subject to inspection. The presiding judge charged that if the jury believed this evidence they should convict. It is now urged that the defendant might have been found working as an apprentice, or under the immediate supervision of a journeyman plumber. But the evidence would not warrant such a finding. We see no error in the manner in which the judge dealt with the first thirteen, the sixteenth and seventeenth requests.

The fourteenth and fifteenth requests raise the constitutionality of the statute. The defendant contends that the statute violates the provisions of the Federal and State Constitutions relating to the personal liberty of the citizen. He contends that he has the right to work at his will and to earn his living by work at any lawful trade or occupation he sees fit, and that this statute unduly interferes with that right and is therefore unconstitutional.

Speaking in general terms, it may be said that no one questions the existence of the right of every person to follow any legitimate calling for the purpose of earning his own living, or for any other lawful purpose. It is a sacred right and is protected both by the Federal Constitution and that of this Commonwealth. U. S. Const. Amendm. art. 14, § 1. Declaration of Rights, art. 1, 10.

But, sacred as this right may be, it is not absolute. Like almost every other individual right, it must yield to the right of the government to impose such reasonable restraints as are required for the protection of the public health, public safety and public morals, or, in other words, to the police power. "The nature of . . . [this] . . . power and its extent, as applied to conceivable cases, cannot easily be stated with exactness. It includes the right to legislate in the interest of the public health, the public safety and the public morals. If the power is to be held within the limits of the field thus defined, the words should be interpreted broadly and liberally. If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strict-

ness, so as not to include everything that might be enacted on grounds of mere expediency." Knowlton, C. J., in *Commonwealth v. Strauss*, 191 Mass. 545, 550.

While the existence of these two rights, namely, the private right to liberty as to work and the public right to be protected as to health, safety and morals, is universally admitted, and, while also there is no question that there is a line beyond which, as against the other, neither can go, still, as might reasonably have been expected, there is considerable diversity of judicial opinion as to where the line shall be drawn; and sometimes also the interpretation and scope of the particular statute may be in dispute. The principles pertaining to the exercise of the police power have been recently considered at some length in *Commonwealth v. Strauss*, *ubi supra*, and at this time there is no occasion for an extended discussion of them. See among others the following cases in which the various sides of the controversy are presented: *Dent v. West Virginia*, 129 U. S. 114; *Powell v. Pennsylvania*, 127 U. S. 678; *Singer v. State*, 72 Md. 464; *Nechamcus v. Warden*, 144 N. Y. 529; *Douglas v. People*, 225 Ill. 536; *Ex parte Smith*, 231 Mo. 111; *State v. Justus*, 90 Minn. 474; *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83; *Henry v. Campbell*, 133 Ga. 882; *State v. Benzenberg*, 101 Wis. 172; *State v. Smith*, 42 Wash. 237.

Plumbing work is frequently installed in dark and comparatively inaccessible places. It is obvious that if the work be badly done the public health may be endangered, and that the defect by reason of its location may not be suspected until after a considerable time. In view of the relation between plumbing work and the public health the Legislature may take reasonable precautions for the protection of the public health from the incapacity and ignorance of the worker. Such is the general weight of the authorities. Upon an examination of this statute we are unable to say that its requirements are unreasonable. See *State v. Benzenberg*, *ubi supra*, arising under a statute very similar to the one before us.

Exceptions overruled.

JAMES BLAKE vs. JOHN F. JOHNSTON COMPANY.

Bristol. October 28, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability.

At the trial of an action by an employee against his employer for personal injuries received in the course of his employment, it appeared that the defendant was installing a steam heating apparatus in a new mill, that just before the accident the plaintiff was assisting in the hanging of a line of pipe to a ceiling and in doing so was standing upon a wooden horse four feet high, that in getting down from the horse his shoe caught upon a projecting nail and he was thrown to the floor. He had received no warning of any likelihood of the presence of a nail. The horse was not the property of the defendant but was found on the premises when the defendant's work began and was used by the carpenters and other workmen. There was no evidence to explain the presence of the nail or tending to show that others using the horse would be likely to drive nails into it, or that any one saw the nail before the accident, and the appearance of the nail was not indicative of age. *Held*, that there was no evidence which would warrant a finding of negligence on the part of the defendant.

TORT for personal injuries received by the plaintiff while in the employ of the defendant as stated in the opinion. Writ dated July 25, 1910.

In the Superior Court the case was tried before *King, J.* Material facts which the evidence tended to prove are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. R. Cummings, (*J. Little* with him,) for the plaintiff.

D. F. Slade, for the defendant.

DECOURCY, J. The defendant had contracted to furnish the steam heating apparatus for a new mill that was being constructed, and at the time of the accident was engaged in hanging a line of steam pipe to the ceiling of the first story. The plaintiff was one of its employees and a short time before the accident had been sent to lower one of the hangers or hooks upon which the pipe rested. While doing this work he stood upon a wooden bench commonly known as a horse, which was about four feet high and five and a half feet long; and, according to his testi-

mony, when getting down his shoe caught in a nail on the end of the horse and he was thrown forward to the floor and injured.

It is not contended by the plaintiff that the horse was in any way unsuitable or defective except as the presence of this nail may have made it so. Apparently the nail had been partly driven into the board that formed the top of the horse, leaving an inch or less out, and this exposed part had been bent so that it projected about a quarter of an inch above the top and protruded about three eighths of an inch beyond the edge of the board. It did not appear that it served any purpose in the construction or use of the horse, and no evidence was offered to explain why or by whom it was driven there.

As a practical matter it would be going far to say that a building contractor owes a legal duty to his workmen to see to it that no protruding nail is left in a staging bench or horse that is being used in the varied and rough work of building construction. See *Jennings v. Tompkins*, 180 Mass. 302; *McDonald v. Dutton*, 190 Mass. 391. But however that may be, in the case at bar a jury would not be warranted by the evidence in finding that the defendant or its acting superintendent was negligent in allowing the workman to use this horse, notwithstanding the presence of the nail and the absence of warning to the plaintiff. It was not the defendant's property, but was found on the premises when its work began, and was used by the carpenters and other workmen. Hence there is no basis for an inference that one of the defendant's employees must have driven the nail. Nor is there anything in the case to suggest that others in using the horse would be likely to drive nails into it, and that, in anticipation of such conduct, the defendant should have inspected it. It appears affirmatively that the defendant did not in fact know that the nail was there, and the alleged superintendent, Mills, who after the accident saw the "stub of a nail," was unable to see it unless his attention was directed to it. Further, although for some months the horse had been used about the building by employees of the different contractors, no witness was called who ever saw the nail before the accident. Its appearance was not indicative of age; and there is nothing but conjecture upon which to base an inference that the nail had been there long enough for the defendant's agents, in the exercise of due care, to have had knowledge of it.

In view of our conclusion that the evidence would not warrant a finding of negligence on the part of the defendant, it becomes unnecessary to consider the question of the plaintiff's due care.

Exceptions overruled.

JOSEPH M. BOURDEAU vs. J. J. PRINDIVILLE COMPANY.

Bristol. October 29, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Negligence, Employer's liability.

A foreman in charge of loading into carts broken stone from a stone crusher, whose principal duty was giving orders and whose only manual labor was the opening and closing of the slides of the hoppers under the stone crusher through which the crushed stone was dropped into the carts, it being his duty to decide under which of the hoppers the teamsters should load and it being the duty of the teamsters to obey him, can be found to have been a superintendent in relation to such teamsters within the meaning of St. 1909, c. 514, § 127, cl. 2, and if, after having closed the slide of one hopper only partially when he should have closed it wholly, he directed a teamster to back his cart under the next hopper and some stone came down from the partly closed hopper on the back of the horse, which the foreman knew to be a nervous one, and caused the horse to bolt and to injure the teamster, the injury can be found to have been caused by a negligent act of superintendence.

TORT under the employers' liability act, against a corporation which was engaged as contractor in constructing a building in New Bedford, for personal injuries sustained on July 20, 1910, when the plaintiff was employed as a teamster by the defendant, from the alleged negligent operation of a stone crusher used by the defendant in its business, whereby the horse of which the plaintiff was in charge was caused to bolt and to throw down and injure the plaintiff. Writ dated September 24, 1910.

In the Superior Court the case was tried before *Lawton, J.* The facts which could have been found upon the evidence are stated in the opinion. Wilson, the foreman in charge there mentioned, was standing on the hub of the wheel of the cart when he opened and shut the slides of the hoppers as described

in the opinion. At the close of the evidence the plaintiff elected to go to the jury solely on the fourth count of his declaration which, under St. 1909, c. 514, § 127, cl. 2, alleged that his injuries were caused by the negligence of a person in the service of the defendant who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence. Thereupon the defendant asked the judge to rule, first, that upon the whole evidence the plaintiff could not recover upon the fourth count of his declaration. The defendant also asked the judge to make the following ruling, numbered 3: "If the jury find that it was a part of the regular duty of Wilson to open and close trap 1, and that he negligently failed to properly close it and thereby caused the injury, his act was the act of a fellow servant, for which the defendant is not liable." The judge refused to make the first ruling requested, and refused to make the ruling numbered 3 except as given in his charge, which was held by this court fully to have covered the subject matter of this request.

The jury returned a verdict for the plaintiff in the sum of \$3,500; and the defendant alleged exceptions.

A. J. Jennings, (*I. Brayton* with him,) for the defendant.

C. R. Cummings & J. Little, for the plaintiff, were not called upon.

DECOURCY, J. The main question presented for decision is whether the evidence warranted the jury in finding that the sole cause of the plaintiff's injury was the negligence of a statutory superintendent while exercising superintendence. The element of the plaintiff's due care is eliminated as the defendant admits that there was evidence for the jury on that issue.

The jury were warranted in finding these facts: A large box for holding the broken stone that dropped from the crusher was supported on posts and stood seven and a half feet above the ground. At the bottom of the box and projecting a foot below were three round hoppers or traps. These were in a line behind one another, and when the plaintiff was getting a load he would back his cart under the box and beneath the particular hopper from which the stone was to come. The opening at the bottom of each hopper was twelve inches in size and was closed by means of a slide.

The foreman in charge, William Wilson, directed the plaintiff to back his cart under No. 1 hopper, which was about three feet from the front of the box. After the cart was partially loaded Wilson went through the customary motions of shutting the slide, but in fact he closed only a portion of the opening. He then ordered the plaintiff to back his cart under No. 2 hopper, which was about three feet farther in than No. 1; and later he opened the slide on No. 2 and a quantity of stone came down. When the cart was loaded Wilson closed the opening of No. 2, and immediately some stone came down from No. 1 hopper, striking the horse on the back and causing it to bolt and throw the plaintiff to the ground.

There was ample evidence that Wilson was a statutory superintendent. He had charge of the gang of men that worked at the stone crusher, his principal work being that of giving orders, and the only manual labor done by him was that of opening and closing the hoppers. It was his duty to decide under which one the teamsters should load, and it was the duty of the men under him to obey him.

Although it is a closer question whether the negligence that caused the plaintiff's injury was one of superintendence, in our opinion that issue also was for the jury under proper instructions. At the time of the accident, whether the failure to close No. 1 hopper was intentional or negligent, Wilson should have known that it was partly open. No one else had the duty of controlling the opening. He knew that the man who was in the box was likely to shovel stone into the hopper that was left open, unless directed by him not to do so. Wilson also knew that the plaintiff's horse was a nervous one, likely to bolt if stones should drop upon its back, and to injure the plaintiff, who was standing at its head in the proper performance of his work. Under these circumstances an order to the plaintiff to move his horse from a place of safety outside the box into a position of danger under the open hopper or trap, without taking any precaution to prevent the shovelling of stone into it or even warning the plaintiff of the danger, might properly be regarded by the jury as negligent superintendence. *Keating v. Hewatt*, 212 Mass. 577, and cases cited.

The only other exception argued by the defendant is that to the refusal of the trial judge to give the third instruction re-

quested. As to this it is sufficient to say that the subject matter of the request, dealing with the non-liability of the defendant for the acts of Wilson while acting as a fellow servant, was fully and clearly covered by the charge.

Exceptions overruled.

OLIVINA LAPLANT vs. J. W. BISHOP COMPANY.

Bristol. October 29, 1912. — November 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability.

Evidence tending to show, that a workman, who was assisting in unloading lumber for his employer by means of a hoisting engine and derrick, was crushed and killed by the falling of a load of the lumber by reason of the defective condition of the hoisting engine in consequence of which it did not hold up the load, will warrant a finding that the death of the deceased was caused by a defect in the ways, works or machinery of his employer within the meaning of R. L. c. 106, § 71, cl. 1, § 73.

In an action under R. L. c. 106, § 71, cl. 2, § 73, for the death of the plaintiff's husband alleged to have been caused by the negligence of a superintendent of the defendant, where it appears that the plaintiff's husband was in the employ of the defendant and was assisting another man in the defendant's employ in unloading lumber by means of a hoisting engine and derrick when he was crushed and killed by the falling of a load of lumber that was being hoisted, if there is evidence tending to show that the load fell by reason of the improper way in which the sling, which was put around the load, was suspended from the hook on the derrick boom, that the principal work of the man whom the plaintiff's husband was assisting was to have charge of the derrick, that his work was overseeing, taking off the loads, piling up the lumber and making all hitches, and that "he had full charge of the derrick, unloading, piling, signalling and one thing and another," a finding is warranted that the death of the plaintiff's husband was caused by the negligence of one entrusted with and exercising superintendence whose sole or principal duty was that of superintendence.

TORT by the widow of Wilfred Laplant, under R. L. c. 106, § 71, cl. 1, 2, § 73, for causing the instant death without conscious suffering of the plaintiff's husband on August 11, 1909, while he was in the employ of the defendant, a corporation, which was engaged in erecting a mill building in New Bedford, the declaration containing two counts as described in the opinion. Writ dated July 27, 1910.

In the Superior Court the case was tried before *Lawton, J.* The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for the defendant both on the first count and on the second count on the grounds stated in the opinion. The judge refused to do so, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$3,000. The defendant alleged exceptions.

G. Grime, for the defendant.

J. W. Cummings, (*C. R. Cummings & J. W. Nugent* with him,) for the plaintiff.

MORTON, J. This is an action of tort under the employers' liability act, so called. R. L. c. 106, §§ 71, *et seq.* The declaration is in two counts: the first for a defect in the ways, works or machinery which had not been discovered or remedied owing to the neglect of the defendant, or of some one in its service entrusted by it with the duty of seeing that said ways, works or machinery were in proper condition, and the second for negligence on the part of one entrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence, or who in the absence of the superintendent was acting as superintendent with the defendant's authority and consent. There was a general verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge at the close of the evidence to direct a verdict for the defendant on the first count on the ground that it had not been proved that the injuries were caused by the ways, works or machinery being in a defective condition which arose from and had not been discovered or remedied in consequence of the neglect of the defendant or of some person in its service entrusted by it with the duty of seeing that said ways, works or machinery were in proper condition; and on the second count on the ground that it did not appear that the death was caused by the negligence of some person in the service of the defendant who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or who in the absence of the defendant's superintendent was acting as superintendent with the consent and authority of the defendant. Neither of these requests raised any question as to the due care of the plaintiff.

At the time of the accident the deceased was in the employ of the defendant and was engaged in assisting a man by the name of Donovan, also in the defendant's employ, in unloading from a team lumber that had been brought to a mill which the defendant company was building. The unloading was done by means of a hoisting engine and derrick. There was evidence tending to show that the hoisting engine was defective and that in consequence of that it did not hold up the load, and that by reason of that and of the improper way in which the sling which was put round the load was suspended from the hook on the derrick boom, the load fell and crushed and killed the deceased. One witness testified that "the piston rings were gone. It [the engine] wouldn't hold the load up after you got it there, after you shut your steam off." He also testified that the way in which the sling was fastened on to the hook was not a proper way to fasten it. The same witness testified further that "Jack Donovan's principal work was to have charge of the derrick; that Jack Donovan's work was overseeing, taking off the loads, piling up the lumber and making all hitches," and on cross-examination he testified that "he [Donovan] was in charge of the derrick, foreman. . . . He had full charge of the derrick, unloading, piling, signalling and one thing and another." There was other testimony to a like effect, and there was contradictory evidence in regard to all of these matters. One witness who had formerly run the engine testified, in substance, that it was in good order, and there was evidence tending to show that Donovan was more a laborer than he was a superintendent, or one whose sole or principal duty was that of superintendence. But these were all questions under suitable instructions for the jury. The defendant rightly concedes that the doing of some manual labor will not prevent a person from being a superintendent within the meaning of the statute, (*Barrett v. New England Telephone & Telegraph Co.* 201 Mass. 117, and cases cited,) and no fault appears to have been found by it with the charge which must be presumed to have dealt adequately with the questions submitted to the jury. It follows from what we have said, that no error appears in the conduct of the trial and that the exceptions must be overruled.

So ordered.

WARREN T. DAVIS vs. P. ALBERT CRISHAM & another.

Essex. November 6, 1912. — November 26, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Toward licensee, Res ipsa loquitur. Mail Clerk.

The owner of a horse and wagon, who has a contract with a railroad corporation to carry the mail between the railroad station and the post office in a town, in transporting in the wagon a railway mail clerk in the employ of the United States, whose duty it is to keep the mail in his custody until it is delivered at the post office, owes him at the most no greater duty in regard to the wagon than to exercise reasonable care to provide one that is safe.

The fact, that the irons which held in place the seat of an open wagon broke when the horse attached to the wagon started suddenly and that a person sitting on the seat fell backward into the body of the wagon, is not evidence of negligence on the part of the owner of the horse and wagon in failing to provide a safe wagon for the transportation of the person on the seat.

TORT, by a railway mail clerk in the employ of the United States, for personal injuries sustained on November 29, 1909, when the plaintiff was thrown backward in a wagon of the defendants near the station of the Boston and Maine Railroad at Amesbury as described in the opinion, the declaration alleging that the defendants owed a duty to the plaintiff to provide a suitable and safe equipment or vehicle to carry the plaintiff and the mail, but that the defendants furnished an unsafe, improper and insecure vehicle or wagon for that purpose and an unbroken and vicious horse to draw the vehicle. Writ in the Second District Court of Essex dated January 13, 1910.

On appeal to the Superior Court the case was tried before *Raymond, J.* The facts which appeared in evidence are stated in the opinion. The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

The case was submitted on briefs.

C. I. Pettingell, for the plaintiff.

A. W. Reddy, for the defendants.

DECOURCY, J. The defendants had an oral contract with the Boston and Maine Railroad to carry the mail between the rail-

road station and the post office in Amesbury, and when the train arrived at seventeen minutes after nine on the morning of the accident, their employee was at the station with an ordinary express or delivery wagon. As somewhat vaguely described in the exceptions, "the seat had . . . two irons down each side and . . . two iron straps hitched on the inside of the wagon so that it would keep the seat from slipping on the body of the wagon." The plaintiff was a railway mail clerk in the employ of the United States government; and there was evidence that by the rules of the post office department he was required to keep the mail that was carried on this particular train in his personal custody until it was delivered at the post office. The driver was to return to the station with mail for the train that would leave Amesbury at thirty-three minutes after nine; and both the plaintiff and the driver testified that this work necessarily was done in a hurried manner, and that it was usual for the driver "to grab the mail and jerk it on to the wagon, . . . grab the reins and start off . . . pell-mell up the street."

On the day of the accident, after the mail was placed in the wagon, the plaintiff sat upon the seat, the driver unhitched the weight from the horse, took the reins and got wholly or partly on the wagon. The horse then suddenly started and the plaintiff and the seat went backward, the plaintiff falling on his back in the body of the wagon. An examination after the accident revealed fresh, clean breaks in two of the small iron straps that held the seat, admittedly due to the accident.

The plaintiff seeks to hold the defendants responsible for his injury solely on the ground that they negligently furnished an unsafe, improper and insecure wagon to carry him. The allegation that the horse was unbroken and vicious has been waived; and neither in the pleadings nor in the brief is any complaint made with reference to the conduct of the driver. The brief reference to the contract in the exceptions discloses no obligation on the part of the defendants to convey the plaintiff, unless it be implied from their agreement "to carry the mail" to the post office. They were not common carriers, and upon the evidence they owed the plaintiff at most no higher duty with regard to the wagon than that of exercising reasonable care to provide one that was safe. It is not contended by the plaintiff that the wagon was in fact

unsafe or improper except as to the irons that held the seat and which broke when the strain of a sudden start was put upon them. But the fastening was one in common use and suitable for the purpose that it served. It does not appear that the most careful inspection would have disclosed any defect or weakness in it. The plaintiff cannot invoke the doctrine of *res ipsa loquitur* to supply a presumption of culpability, for not only does he fail to exclude the operation of causes other than the negligence of the defendants, but the most probable inference to be drawn from the facts is that when the horse started the plaintiff fell backward and pulled the seat with him, — and indeed the driver so testified. The evidence would not warrant the jury in finding that the accident was caused by negligence on the part of the defendants. *Childs v. American Express Co.* 197 Mass. 337. *Trim v. Fore River Ship Building Co.* 211 Mass. 593.

Exceptions overruled.

JOHN H. CASHMAN vs. CITY CLERK OF SALEM.

Essex. November 22, 1912. — November 26, 1912.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Elections. Statute. Salem. Words, "Ballots," "Votes."

St. 1912, c. 559, Part III, § 1, provided that the registered voters of the city of Salem at the State election in the year 1912 should "vote primarily on the following question: 'Shall the present charter of the city of Salem be repealed?' and secondarily on the following question: If the present charter of the city of Salem is repealed, shall the new charter of the city be: 'Plan 1, . . . ' or 'Plan 2 . . . ?'" and then continued as follows: "If on a majority of the ballots cast at said election, the votes shall be for a repeal of the present charter of the city of Salem, the plan receiving the larger number of votes on the secondary question shall be adopted as the charter for the city." The official ballot which contained these questions contained also the names of a large number of candidates for State and national offices and several other questions, including two upon the adoption of amendments to the Constitution. A majority of the votes upon the question of repealing the charter of the city of Salem were for such repeal, but a majority of all the official ballots lawfully deposited in the ballot boxes at that election by the registered voters of the city of Salem were not cast in favor of such repeal, a large number of such ballots having been left blank upon

that question. *Held*, that the "majority of the ballots cast at said election," required by the statute for the repeal of the charter, was a majority of the votes cast upon that question, and that the charter was repealed.

PETITION, filed on November 15, 1912, by a citizen of Salem for a writ of mandamus addressed to the city clerk of that city commanding him to accept and file a nomination paper nominating the petitioner for the office of alderman in accordance with the provisions of the charter of the city of Salem, St. 1836, c. 42.

The answer of the respondent alleged that the former charter of Salem had been repealed by vote of the citizens at the State election held on November 5, 1912, in accordance with St. 1912, c. 559, Part III, § 1, and that the respondent had refused to accept the nomination paper of the petitioner because under the new charter there was no such office as alderman.

At the request of the parties the case was reserved by *Morton, J.*, upon the petition and answer and an agreed statement of facts for determination by the full court.

The case was submitted on briefs.

W. H. McSweeney, M. J. McSweeney & F. H. Caskin, Jr., for the petitioner.

M. L. Sullivan & J. J. Ronan, for the respondent.

A. P. White, A. W. Putnam & R. W. Hill, for the Salem Charter Association.

RUGG, C. J. Whether the city charter of Salem should be repealed was submitted to the voters of that city on the fifth of the present month, under the provisions of St. 1912, c. 559, Part III, § 1. Its material language is: "This act shall be submitted to the registered voters of the city of Salem at the State election in the year nineteen hundred and twelve, and the city clerk shall, not less than two weeks before said election, transmit . . . to every qualified voter in said city a copy of this act. At the said election the voters shall vote primarily on the following question: 'Shall the present charter of the city of Salem be repealed?' and secondarily on the following question: If the present charter of the city of Salem is repealed, shall the new charter of the city be: 'Plan 1, . . .' or 'Plan 2 . . . ?' If on a majority of the ballots cast at said election, the votes shall be for a repeal of the present charter of the city of Salem, the plan receiving the larger number of votes on the secondary question shall be adopted

as the charter for the city." The ballot on which these questions were printed contained also the names of a large number of candidates for State and national offices, and several other questions including two questions upon the adoption of amendments to the Constitution. The total number of ballots cast at that election was 6,966, of which on the question of repealing the charter 1,676 were blank, 2,240 were against, and 3,050 were for, repeal. The point to be decided is whether the charter was repealed.

A technical construction of the words used might lead to the conclusion that "ballots" refers to the official ballots furnished by public authority, containing the names of all candidates to be voted for and all questions submitted to popular vote, and that the repeal is to be effected only by a vote therefor appearing upon a majority of all the official ballots which are deposited lawfully in the ballot boxes. Argument in support of this view may be drawn from the phraseology of other acts of the Legislature of 1912 requiring submission to popular vote on the same general ballot and acceptance by "a majority of the voters voting thereon," or "persons voting thereon." Sts. 1912, c. 503, § 2; c. 587, § 1. Resolves, cc. 21, 115.

But broader and sounder considerations lead to the conclusion that the statute means that only the ballots on which were votes touching the particular question were to be counted in determining whether there has been a repeal. It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections, which is the choice among candidates or the approval of policies. This principle is expressed in the provisions of our Constitution to the effect that in elections of civil officers those having a plurality of the votes cast shall be elected, and that amendments of the Constitution shall

be adopted by the majority of those voting thereon. Those who come to an election and cast a blank ballot in principle are no more efficacious in expressing their convictions than those who absent themselves altogether. Both classes must be presumed to be willing to abide by the decision made by the majority of those voting, unless there is an express provision of law to the contrary. *First Parish in Sudbury v. Stearns*, 21 Pick. 148. *Carroll County v. Smith*, 111 U. S. 556, 563.

It has been the unvarying policy of the Legislature to make the acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question. See statutes collected in *Wheelock v. Lowell*, 196 Mass. 220, 226, and for those enacted since that opinion see Sts. 1911, c. 531, § 79 (Cambridge); c. 680, Part III, § 1 (Chelsea); c. 645, § 67 (Lowell); 1910, c. 542, § 48 (Beverly); c. 602, Part III, § 1 (Lynn); 1909, c. 486, § 35 (Boston); c. 448, § 24 (Taunton); 1908, c. 611, § 31 (Gloucester); c. 574, § 46 (Haverhill); c. 559, § 12 (Chelsea).

The language of all these statutes (numbering nearly one hundred), with two or three exceptions where a popular vote was not required, is unmistakable to the effect that acceptance rests upon the affirmative votes of a majority of those voting on the question. The form of words used has not been the same, but the purpose has been clear. It is only within a brief period that there has been submitted not only the question whether an old charter shall be repealed but also, if it is repealed, which of two radically different forms of municipal government shall be adopted. This complexity has given rise to the use of language in two other instances like that in the case at bar, where the vote was to be had at a general election. Sts. 1911, c. 621, Part III, § 1 (Lawrence); c. 732, Part IV, § 1 (Pittsfield). The framing of questions under such circumstances, so that their terms may be too plain for argument, while simple, is not instantly obvious. No reason is apparent why a rule for the acceptance of these particular charters by the voters of Lawrence, Pittsfield and Salem should be adopted by the Legislature essentially different from that followed in the large number of other city charters enacted from time to time for these and other municipalities. In view of this long established legislative practice, illustrated by so many instances, it would require clear and unequivocal language to indicate a

change of legislative purpose. If such a departure had been deliberately intended, it would have been easy to express it so that it would have been free from doubt. To have said that the old charter should be repealed only by affirmative votes appearing upon a majority of all official ballots, including blanks, legally deposited in the ballot boxes for any purpose, would not have been open to uncertainty. A continued legislative intent in this regard is more natural than a violent departure from a custom.

As a construction can be given readily to the language now to be interpreted in harmony with this legislative practice, it is probable that this meaning was intended. There is no logical connection between the votes for other questions or other candidates and the charter question. They are separate and distinct. No ground in principle appears why every other proposition submitted to the people should be adopted by a majority of those voting on it and this one require the approval of a majority of all who cast ballots for any object.

A close analysis of the decisive words of the statute demonstrates that they are reasonably susceptible of a meaning consistent with the broader considerations which have been adverted to. The word "election" is used in two different senses in the portion of the statute which has been quoted. In its first two uses it refers to the general State election for the purpose of fixing the time and places at which the voting on this question shall be had. In its third use, namely, "At the said election the voters shall vote primarily on the following question," it must refer to the vote upon the question itself. The Legislature hardly would say to the voters of Salem, at a State and national election, where many candidates, respecting whose election public feeling might be intense and widespread, were submitted to the suffrage and two questions of the magnitude of constitutional amendments were to be answered, that their first or chief duty related to the repeal of their city charter and their next obligation was to consider which of two forms should be substituted for it. In its fourth use, in the final sentence quoted from the statute, it may refer to the question itself as readily as to the general election. "Ballot" and "vote," though in some connections of different meaning, are shown by the dictionaries as well as by common observation to be used occasionally as synonyms. It is to be noted that the

words "official ballots," which are defined by St. 1907, c. 560, § 1, are not employed, but simply "ballots." "Ballots" and "votes" appear to be used here as having the same signification, and not for the purpose of expressing the sharp distinction which would have arisen if the official ballot as a whole had been referred to expressly. It is provided in the election law (St. 1907, c. 560, § 271) that if the choice of a voter cannot be determined touching any candidate, his ballot shall not be counted. It would require exceptionally plain language in a special law to override this general rule and give the force of a negative vote to a blank.

The language of St. 1911, c. 732, revising the charter of the city of Pittsfield, strongly and perhaps decisively confirms the view that the Legislature, even though choosing different language, did not intend to change its policy. In Part IV, § 1, of that act, which provides for submitting to popular vote at the State election questions as to which of several plans should be adopted, the words "If on a majority of the votes cast at said election" are used as meaning the same as the words "If on said question a majority of the voters voting thereon." This is in substance a declaration by the Legislature that it uses the two phrases as synonymous. If that is the meaning of substantially the same words in one statute, it is forcibly persuasive of their meaning in another similar statute.

There are many conflicting decisions in other jurisdictions upon somewhat similar questions. Most of them are collected and discussed in 1 Dillon, Mun. Corp. (5th ed.) 383; 15 Cyc. 390. It is not necessary to review them in detail. The leading ones in consonance with this opinion are in the footnote.*

* *County of Cass v. Johnston*, 95 U. S. 360. *Gillespie v. Palmer*, 20 Wis. 544. *Walker v. Oswald*, 68 Md. 146. *Bott v. Secretary of State*, 33 Vroom, 107. *Commissioners of Marion County v. Winkley*, 29 Kans. 36. *State v. Echols*, 41 Kans. 1. *Smith v. Proctor*, 130 N. Y. 319. *State v. Blaisdell*, 18 No. Dak. 31, 39. *Fox v. Seattle*, 43 Wash. 74. *State v. Grace*, 20 Ore. 154. *Davis v. Brown*, 46 W. Va. 716. *Board of Education v. Winchester*, 120 Ky. 591. *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629. *Tinkel v. Griffin*, 26 Mont. 426. *Howland v. Board of Supervisors*, 109 Cal. 152. *Strain v. Young*, 25 Wash. 578. *State v. Langlie*, 5 No. Dak. 594. *Contra*, in addition to cases cited in Dillon and Cyc., *People v. Weber*, 222 Ill. 180, 186, *Joe v. State*, 136 Ga. 158.

This judgment rests, however, not upon authority but upon the reasoning stated.

The conclusion follows that the majority of the votes cast upon the charter question being in favor of its repeal, that result was accomplished and Plan 2 of the statute (St. 1912, c. 559, Part II) was adopted as the new charter.

Petition dismissed without costs.



HENRY M. SHAUGHNESSY vs. BERNARD ISENBERG & another.

Worcester. September 30, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Mechanic's Lien. Practice, Civil, Agreed statement of facts.

Upon an appeal from a decree dismissing a petition to establish a mechanic's lien which was submitted to the trial judge upon an agreed statement of facts containing no stipulation that inferences of fact might be drawn, the only question presented is whether upon the facts stated, without any deductions being drawn from them, the petitioner is entitled to a decree establishing his lien.

A lien on real estate under R. L. c. 197 for labor and materials is not lost by mere delay in completing the contract if the contract was completed in good faith and without any conduct which could constitute an estoppel, although after the making of the contract and before its completion a mortgage of the property was made and foreclosed without any knowledge of the contract on the part of the mortgagee or of the purchaser at the foreclosure sale.

On a petition to enforce a mechanic's lien on real estate for the balance due upon an entire contract made by the petitioner with the owner of the land for furnishing labor and materials, it appeared, by an agreed statement of facts containing no stipulation that inferences of fact might be drawn, that after the making of the contract the owner made a mortgage of the property which was foreclosed before the contract was completed, that neither the respondent, who held title under the purchaser at the foreclosure sale, nor the mortgagee nor such purchaser had any knowledge of the petitioner's contract, that the respondent acquired his title more than nine months after the contract was made, that more than a year and four months after the respondent acquired his title the petitioner furnished several days' labor and a small amount of material and that thereby the work required by the contract was completed, that such work was done by the petitioner in good faith for the purpose of finishing his contract and that he had no notice of any change in title until just before filing his sworn statement in compliance with R. L. c. 197, § 6. The trial judge made a decree dismissing the petition on the ground that "the petitioner unreasonably delayed the

complete performance of his contract without any explanation or excuse." On appeal, it was *held*, that the record did not show unreasonable delay, and that, if such delay had been shown, it could not have been ruled rightly that the petitioner must fail because he unreasonably delayed the complete performance of his contract; and the decree dismissing the petition was reversed.

RUGG, C. J. This is a petition to enforce a mechanic's lien for the balance due upon an entire contract made by the petitioner with the owner of the land for furnishing labor and materials. The case was submitted upon an agreed statement of facts, in substance as follows: The contract was dated on August 7, 1909. Subsequently certain mortgages were given by the owner, through the foreclosure of which the defendant Goldman traced his title, which he acquired on November 12, 1910. Neither he nor any of the mortgagees nor the purchaser at the mortgagees' sales had any knowledge of the plaintiff's contract, although it was not completed at the time of the foreclosure of the mortgages. Between March 15 and March 22, 1911, several days' labor was performed and a small amount of material was furnished by the plaintiff, and the work required by the contract was completed. This work was done without the knowledge of the mortgagees or of the purchaser at the foreclosure sale or of the defendant Goldman, and, as far as the latter knew, the plumbing (to which the contract related) was completed when he took his title. The plaintiff did all the work necessary to finish his contract, after Goldman became owner, in good faith for the purpose of finishing his contract, and he had no knowledge of any change in title until just before filing his certificate. Upon these facts a judge of the Superior Court * ordered the petition dismissed on the ground that "the petitioner unreasonably delayed the complete performance of his contract without any explanation or excuse." The petitioner's appeal brings under review the correctness of this ruling.

It is to be noted that there is nothing in the agreed facts to show the date when the last labor was performed by the petitioner before March 15, 1911. There is no stipulation that inferences of fact may be drawn by the court. Hence the only question presented is whether upon the facts stated the petitioner is entitled to maintain his petition. The presumptions in favor of a general

* *Irwin, J.*

finding by the court where rational deductions may be drawn from the evidence is absent. *Cunningham v. Connecticut Fire Ins. Co.* 200 Mass. 333.

A mechanic's lien relates back to the time of the contract, and takes precedence over subsequent mortgages and conveyances. *Dunklee v. Crane*, 103 Mass. 470. The lien having once attached continues until everything required by the contract has been done, unless the contract is terminated in some way before it is fully performed. *Gale v. Blaikie*, 126 Mass. 274. *Dodge v. Hall*, 168 Mass. 435, 441.

The essential factors under the statute for determining the existence of a lien for the performance of a contract for materials and labor are whether the items, which are relied upon to keep the lien alive, are furnished in fulfilment of the contract and in good faith. Even though the last work may be trifling in amount or considerably removed in time from the period when the bulk of the work has been done, if the contract still subsists and has not been abrogated and if good faith inheres in the final part of the performance and it is not done colorably for the purpose of reviving the lien, this is enough to preserve the lien, in the absence of any conduct amounting to an estoppel. Long delay in completing the contract ordinarily would be a material element in deciding whether the contract had been abandoned. This together with the extent of the unfinished parts of the contract well might be decisive in passing upon the good faith of the person claiming the lien. Moreover, if a time had been fixed for the completion of the contract, delay thereafter might be a significant fact. But there was no time limit for finishing the present contract. The agreed facts are express to the point that the final work was done under the contract and in good faith. There is nothing in the record to estop the petitioner from enforcing his lien.

It has never been held, under our statute, that mere delay in completing a contract, which still subsists as a binding agreement, in the absence of bad faith or words or conduct amounting to an estoppel is fatal to the maintenance of a lien. The rule laid down in *Flint v. Raymond*, 41 Conn. 510, and *Sanford v. Frost*, 41 Conn. 617, to the effect that a delay in completing a contract until the rights of an innocent purchaser have intervened bars a lien, has never been adopted by this court. It would engraft something

on our statute which is not in it. The statute is remedial and intended to protect those who lawfully enhance the value of land by the expenditure upon it of material or labor. As has been pointed out, the record does not show unreasonable delay. Even if it did, while the contract remains in force and the work is done in good faith, the lien is not lost. It follows that it could not have been ruled rightly that the petitioner must fail because he "unreasonably delayed the complete performance of his contract." For cases bearing generally upon the subject see *Monaghan v. Putney*, 161 Mass. 338; *Burrell v. Way*, 176 Mass. 164; *McLean v. Wiley*, 176 Mass. 233; *D. L. Billings Co. v. Brand*, 187 Mass. 417.

Decree dismissing petition reversed.

The case was submitted on briefs.

J. H. Reid, for the petitioner.

M. L. Katz, for the respondents.

INHABITANTS OF MILFORD vs. COUNTY COMMISSIONERS OF
WORCESTER.

Worcester. September 30, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Tax, Abatement, Exemption. Statute, Construction. Charity.

A person aggrieved by an assessment of a tax on personal property is not required to pay the tax under protest and sue to recover the amount paid, but may proceed in the first instance by a petition for an abatement.

Under St. 1909, c. 490, Part I, § 76, a finding of fact by a board of county commissioners, upon a petition for the abatement of a tax, that there was good cause for delay in bringing in to the assessors the list required by the statute, raises no question of law upon the record which is open to review upon a writ of certiorari, and this applies to a finding that an omission to bring in such a list by a corporation seeking exemption from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3, was not wilful.

A statute providing an exemption from taxation should be construed strictly.

Whether a private cemetery corporation, none of whose officers receive compensation, which is not required by law to maintain a burial place for the public or for any general class other than those to whom it has sold lots but always has maintained a cemetery of great benefit to the public, which has un-

restricted power to limit its membership but never has done so, and obtains funds for its maintenance and the maintenance of lots of its members from sales of lots and voluntary gifts, is a charitable corporation, here was not decided. The personal property of a private cemetery corporation is not exempted from taxation by St. 1909, c. 490, Part I, § 5, cl. 3, relating to the exemption from taxation of property of literary, benevolent, charitable and scientific institutions.

PETITION, filed on January 5, 1911, for a writ of certiorari to review the proceedings of the county commissioners of Worcester County in abating a tax on personal property assessed for the year 1910 by the assessors of the town of Milford to the Proprietors of the Pine Grove Cemetery of Milford, a Massachusetts corporation.

The ground on which the county commissioners abated the tax was that they found the corporation to be a charitable institution within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3, and therefore, under the provisions of that clause, exempted from taxation.

The petitioner objected to the finding of the county commissioners as stated in its petition, on four grounds, contending (1) that the county commissioners had no jurisdiction and could not lawfully act in the matter because the Proprietors of the Pine Grove Cemetery had not paid the tax before commencing its proceedings before the county commissioners for an abatement thereof; (2) that the county commissioners wrongly found that the Proprietors of the Pine Grove Cemetery was a charitable institution; (3) that the county commissioners wrongly found that there was reasonable cause for delay on the part of the Proprietors of the Pine Grove Cemetery in filing the list required under St. 1909, c. 490, Part I, § 41; (4) that the county commissioners could not lawfully abate the tax because the Proprietors of the Pine Grove Cemetery had not in fact filed the statement required under St. 1909, c. 490, Part I, § 41, for charitable corporations.

Other facts are stated in the opinion.

The case was reserved by *Rugg, C. J.*, for determination by the full court.

The case was submitted on briefs.

J. C. Lynch & W. A. Murray, for the petitioner.

R. B. Dodge, W. J. Taft & W. Williams, for the respondents.

RUGG, C. J. This is a petition for a writ of certiorari. It brings under review the record of the county commissioners of Worcester County in granting an abatement of taxes assessed upon certain personal property of the Proprietors of the Pine Grove Cemetery of Milford.

1. The person assessed was not required to pay the tax and sue to recover it back, but might seek an abatement in the first instance. *Ingram v. Cowles*, 150 Mass. 155. *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 498.

2. The commissioners found, under St. 1909, c. 490, Part I, § 76, that there was good cause for delay on the part of the corporation in filing the list required by law. This was a fact, and there is nothing to show that any error was committed in ascertaining it. No question of law touching it appears in the record.

3. The same observation applies to the contention that the failure to bring in the list required by St. 1909, c. 490, Part I, § 41, was fatal to the right of the corporation to an abatement. *Masonic Education & Charity Trust v. Boston*, 201 Mass. 320, 326.

4. The real issue is whether the personal property of the Proprietors of the Pine Grove Cemetery is exempt under St. 1909, c. 490, Part I, § 5, cl. 3, which relieves from taxation the personal property of "benevolent" and of "charitable" institutions. The facts stated in the return of the county commissioners in substance are that the corporation was organized under St. 1841, c. 114, in 1850, and about that time acquired a considerable tract of land which has been dedicated to cemetery purposes, and which is well and carefully kept to this end. There is no limitation in the charter or by-laws as to the persons who may purchase lots, and the right to purchase has been open to the public, and each purchaser has become a member of the corporation. For many years the cemetery was maintained largely by contributions and by the profits from fairs and entertainments. But recently the sales of lots and gifts have supplied funds sufficient for its maintenance. Lots have been sold on condition that a part of the purchase price shall be added to a fund to provide for their perpetual care, and for the support of paths and drives and other parts of the cemetery of common benefit to all lot owners. None of the officers receives compensation. The cemetery is a great benefit to the public, and has been and is maintained solely for

that purpose. The corporation is not required by law to maintain a burial place for the public or for any general class other than those to whom lots are sold, and its power is unrestricted to limit its membership. It has been held that there is no ground for calling a cemetery corporation, such as the one here in question, a charitable corporation. *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass. 163. See *Hopkins v. Grimshaw*, 165 U. S. 342, 352, 353. But without placing the decision upon this ground, we are of opinion that a general view of the tax exemption laws manifests a legislative purpose not to include cemetery corporations under the designation of charitable or benevolent institutions.

An exemption from taxation is an extraordinary grace of the sovereign power, and is to be strictly construed. It must be made to appear plainly, either by the express words or necessary intendment of the statute. The constitutional limitations upon the legislative power in this direction have not been discussed much by this court. *Day v. Lawrence*, 167 Mass. 371. *Opinion of the Justices*, 195 Mass. 607. It is beyond doubt that exemption of land set apart for the burial of the dead and of the property of literary, benevolent and charitable institutions encounter no constitutional objection. It is an elementary rule of statutory interpretation that acts of the legislative department of government are to be construed as a whole. This is especially true of a comprehensive statutory scheme covering in detail an entire subject and designed to express a general and complete legislative purpose such as our law relating to taxation. Clause 8 of § 5, Part I, of c. 490, St. 1909, expressly exempts from taxation "cemeteries, tombs and rights of burial, so long as they shall be dedicated to the burial of the dead." The same section exempts various other classes of property, including the real and personal estate of incorporated agricultural societies and portions of that belonging to horticultural societies, the real and personal estate to a limited amount of incorporated Grand Army and veteran associations, houses of religious worship, with pews and furniture, as well as the personal property of literary, benevolent, charitable and scientific institutions and of incorporated temperance societies.

It is obvious, from this arrangement of the statute relating to

exemptions, that it was the intention of the Legislature not to include under a general exemption property devoted to uses which by another clause of the section was given a special and more limited exemption. Some of these exemptions are of property of charitable institutions; for example, houses of religious worship, not held by their proprietors for the use of pew-holders rather than the public, are held for charitable purposes. *Sears v. Attorney General*, 193 Mass. 551, 554, 555. But it is apparent that all property devoted by charitable corporations to religious uses is not exempt from taxation. Both the real and personal property of a religious society, although undoubtedly a charitable corporation, is subject to taxation, except only such real estate as is expressly exempted. St. 1909, c. 490, Part I, § 5, cl. 7, and § 25. *First Universalist Society in Salem v. Bradford*, 185 Mass. 310, 312, and cases there cited. If the Legislature had intended to exempt from taxation all the real and personal property of cemetery corporations, it hardly would have made the express exemption of cemeteries, tombs and rights of burial so long as dedicated to the burial of the dead. The history of the statute confirms this view. The first special statute of which we are aware authorizing a corporation to establish a cemetery was St. 1831, c. 69, by which the Massachusetts Horticultural Society was empowered to dedicate any part of its real estate for a cemetery. This act, however, contained no exemption from taxation. The Proprietors of the Cemetery of Mount Auburn was created a corporation by St. 1835, c. 96, section 12 of which exempted from taxation its cemetery, but not its personal property. After the enactment of the Rev. Sts. c. 7, § 5, clause 2 of which exempted from taxation real and personal property of charitable institutions, numerous other acts of incorporation of private cemeteries were passed, all of which authorized the holding of both real and personal estate, but exempted from taxation only the land devoted to burial purposes.*

St. 1841, c. 114, was the first general law for the incorporation of proprietors of cemeteries. But this act exempted from taxation only burial places so long as they remained dedicated to that

* Sts. 1836, c. 46, § 5; 1837, c. 130, § 4; 1839, c. 22, § 5; 1840, c. 4, § 5; 1840, c. 91, § 5; 1838, c. 20, § 5; 1838, c. 17, § 3; 1841, c. 2, § 5.

use, and did not exempt other real and personal property which such corporations were empowered to hold. This special exemption has continued in successive revisions of the general law to the present time. Gen. Sts. c. 11, § 5, cl. 8. Pub. Sts. c. 11, § 5, cl. 8. R. L. c. 12, § 5, cl. 8. St. 1909, c. 490, Part I, § 5, cl. 8. If it had been supposed by the Legislature that these corporations were charitable, and if it had been intended that their exemption from taxation should stand on that basis, it is inconceivable that such pains would have been taken through so many years as to a special and limited exemption confined to land devoted to cemeteries.

This review of the statutes demonstrates that so far as exemption from taxation is concerned cemetery corporations have been treated as a class by themselves. The Legislature has not intended that they be included under the general language which may be employed in other parts of the statute. It follows that the personal property of private cemetery corporations is not exempted from taxation under the clause relating to benevolent and charitable institutions, and that the county commissioners erred in granting the abatement.

Writ of certiorari to issue.

MARY O. RUGGLES vs. EMMA O. JEWETT.

Worcester. October 14, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Partition. Probate Court. Devise and Legacy.

R. L. c. 184, § 31, provides that "Probate courts shall have concurrent jurisdiction with the Superior Court of petitions for partition of land held by joint tenants or tenants in common if the shares do not appear to be in dispute or uncertain," and § 32 provides that, "If it is found by the Probate Court in which such petition is filed that the shares are in dispute or uncertain, the court may, or, at the request of any party in interest, shall, order the case to be removed to the Superior Court." *Held*, that, even where the shares may be found to be in dispute or uncertain, if all the parties request a determination of the questions at issue by the Probate Court, that court may exercise jurisdiction.

The first clause of the will of a testatrix was as follows: "I give and bequeath to my daughters E and M the home place which was deeded to me by my husband . . . , as long as they remain single. The one marrying first, then giving up all her right and title in the place to the unmarried sister." The residuary clause of the will divided equally between the same two daughters the residue of the estate of the testatrix, specifically including her share in the estate of her deceased husband. Both the daughters married. The one who married later claimed the whole of "the home place" as having passed to her upon the earlier marriage of her sister. *Held*, that the words in the first clause, "as long as they remain single," were words of limitation and created life estates determinable on the marriage of each of the daughters, and that, on the termination of the life estates by the marriage of both daughters, the daughters held the property in equal shares under the residuary clause.

A provision in the will of a testatrix giving to two daughters named life estates in "the home place . . . , as long as they remain single," with a provision that on the marriage of either of them her life estate shall pass to her sister, followed by a clause making the same two daughters residuary devisees to whom "the home place" is devised subject to the life estates, is not against public policy as being in restraint of marriage.

APPEAL from a decree of the Probate Court for the county of Worcester granting a petition for the partition of certain real estate in the town of Hardwick which was filed on September 7, 1911.

The appeal was heard by *Rugg*, C. J., upon an agreed statement of facts, by which the following facts appeared:

Mary Ann Orcutt, who was the mother of the petitioner and the respondent, died on February 24, 1893. She left a will containing the following provisions:

"First. I give and bequeath to my daughters Emma B. and May M. Orcutt the home place which was deeded to me by my husband Almon M. Orcutt, M.D., as long as they remain single. The one marrying first, then giving up all her right and title in the place to the unmarried sister;

"Second. All things contained in the house to be divided equally between Emma B. and May M. Orcutt, with the exception of last silver spoon bought of William Bodwin, Cameo pin, and black silk dress which I give to May M. Orcutt.

"Third. I give and bequeath all other property which I hold in my name in whatever form or shape it may appear either real or personal and my share in my deceased husband Almon M. Orcutt, M.D., estate to my daughters Emma B. and May M. Orcutt to be equally divided between them."

The fourth, fifth, sixth and seventh clauses of the will con-

tained small pecuniary bequests which are not material. The eighth clause, which was the last before the attesting clause, was as follows:

"Eighth. I hereby nominate and appoint Emma B. and Mary M. Orcutt, executrixes and residuary legatees of this will, and that they shall not be required to give bonds under this will."

The property of which partition was sought was "the home place" described in the first clause of the will of Mary Ann Orcutt. Her daughter Mary M. Orcutt, mentioned in that clause as May M. Orcutt, married on January 31, 1894, and became Mary O. Ruggles. The daughter Emma B. Orcutt, mentioned in that clause, married on November 20, 1895, and became Emma O. Jewett. The petition for partition was brought by Mary O. Ruggles. The respondent, Emma O. Jewett, claimed the entire title to the property in question. In the Probate Court *Chamberlin, J.*, made a decree, which, after reciting that the respective shares or proportions of the persons interested were not in dispute and uncertain but that all parties requested that the case should not be removed to the Superior Court and that the Probate Court should proceed to a decree upon the partition, and after reciting further that the real estate could not be divided advantageously, ordered that partition should be made and appointed a commissioner to sell the property. The respondent appealed. At the request of the parties the Chief Justice reserved the appeal for determination by the full court.

The case was submitted on briefs.

F. C. Smith, Jr., G. A. Gaskill & E. A. Brodeur, for the respondent.

E. B. Johnson, for the petitioner.

Rugg, C. J. This is a petition for partition of real estate alleged to be held by the petitioner and the respondent in moieties as tenants in common. It is brought under R. L. c. 184, §§ 31, 32. Section 31 gives jurisdiction to the Probate Court "if the shares do not appear to be in dispute or uncertain." Section 32 provides, however, that "If it is found by the Probate Court in which such petition is filed that the shares are in dispute or uncertain, the court may, or, at the request of any party in interest, shall, order the case to be removed to the Superior Court." These two sections should be construed together. The jurisdiction of

the Probate Court to dispose finally of the matter according to § 31 is dependent upon absence of dispute or uncertainty as to the shares. But the kind and extent of that dispute or uncertainty and its ultimate jurisdictional effect are defined in § 32. The history of the statute shows the importance of this section. By St. 1869, c. 121, § 1, concurrent jurisdiction of petitions for partition was conferred upon the Probate Court if the shares were not in dispute or uncertain. It went no further. But by St. 1874, c. 266, § 1, the provisions now found in § 32 were added. Section 32, construed in connection with § 31, means that even though the shares may be found to be in dispute or uncertain, if both parties request a determination of the questions at issue by the Probate Court, jurisdiction may be exercised, unless that court, notwithstanding the request of parties, orders the case removed to the Superior Court. The case must be transferred to the Superior Court only when the Probate Court has decided that the shares are in dispute or uncertain as defined in *Dearborn v. Preston*, 7 Allen, 192, *Marsh v. French*, 159 Mass. 469, and when in addition to such decision some party in interest requests or the Probate Court of its own motion orders such removal. The record in the present instance shows a preliminary determination by the Probate Court that the shares are not in dispute or uncertain, and a request by all parties that the case be not removed to the Superior Court, but be determined by the Probate Court. Under these circumstances, jurisdiction remained in the Probate Court, although there may be a subsequent determination that the shares are uncertain, or a real doubt about them apparent on the face of the papers. Sections 31 and 32 are different both in substance and historically from § 43 of the same chapter, which defines the more ancient jurisdiction of the Probate Court to make partition of all the land within the Commonwealth of a deceased person, whose estate is in process of settlement or has been settled in the Probate Court in which the petition is brought.

The title to the land described in this petition depends upon the construction to be given to the will of Mary Ann Orcutt, the mother of both the petitioner and the respondent. Its first clause is: "I give and bequeath to my daughters Emma B. and Mary M. Orcutt the home place which was deeded to me by my

husband Almon M. Orcutt, M.D., as long as they remain single. The one marrying first, then giving up all her right and title in the place to the unmarried sister." The words, "as long as they remain single," are words of limitation and create a life interest determinable on the marriage of each. *Dole v. Johnson*, 3 Allen, 364. *Knight v. Mahoney*, 152 Mass. 523. *Fuller v. Wilbur*, 170 Mass. 506. *Giles v. Little*, 104 U. S. 291. The object of the clause is to provide for the beneficiaries while they remain single. The main purpose is not to promote celibacy, and therefore it is not against public policy as being in violation of the rule against restraint of marriage. *Harlow v. Bailey*, 189 Mass. 208, 212. The clause relates to a home which would naturally be given up for another by the one marrying first. The will as a whole manifests a testamentary design to treat the two daughters equally. The second clause disposes of the household effects, while the third, although a true residuary clause, specifically mentions the share of the testatrix in her deceased husband's estate, and both clauses direct an equal division between the two daughters. The eighth clause nominates them executrices, and repeats expressly that they shall share equally as residuary legatees. Treating the will as a unit, the intent of the testatrix appears to be effectuated by construing the first clause as creating life estates in the daughters terminable upon marriage. The last sentence of this clause should be construed as desiring through excess of caution to put in precise words the legal effect of the preceding sentence, that the one marrying first surrenders to the other remaining single the right and title conferred upon her. But the surrender should be confined to that clause, and not extended to other parts of the will. The language should not be given a technical construction, possible perhaps in other connections, but which in this instance would work a result utterly out of harmony with the general purpose of the testatrix, plainly manifest by the instrument as a whole. *Little v. Silveira*, 204 Mass. 114.

The fee of the home place passed to both the daughters under the residuary clause. Hence both having married, the life estates created by the first clause of the will have come to an end, and the residuary clause alone governs the present rights of the parties.

Decree affirmed.

BRISTOL MANUFACTURING CORPORATION vs. ARKWRIGHT MILLS.

Bristol. October 28, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Contract, Making. Sale, Delivery.

In an action for the price of certain cotton cloth alleged to have been sold and delivered to the defendant, it appeared that by the terms of the sale the plaintiff agreed to make and deliver to the defendant a designated large amount of the cloth, that the bales of cloth were to be numbered by the plaintiff beginning with a number to be named by the defendant, and that the goods were to be delivered by the plaintiff to a common carrier for shipment to the defendant, that, after a part of the goods had been shipped by the plaintiff and had been accepted by the defendant without question, the defendant attempted to sell a further shipment of the goods to a third person, who refused to take them on the ground that they were not of the required quality, and that, while negotiations between the defendant and the third person were pending, the defendant wrote to the plaintiff as follows: "Please hold shipments of 28" goods, covered by insurance, subject to our order. Will let you know the result of our examination as soon as completed." The plaintiff continued to manufacture the goods called for by the contract, packed them in bales and numbered the bales according to the previous directions of the defendant, stored them in the plaintiff's storehouse, insured them and held them according to the instructions in the defendant's letter. *Held*, that the directions in the defendant's letter, that the goods withheld from shipment by the plaintiff should be covered by insurance and should be held subject to the defendant's order, constituted a request for a modification of the original provision of the contract as to delivery of the goods to a common carrier, with an additional stipulation as to insurance, and that when these directions were accepted and carried out by the plaintiff the contract was changed to that extent.

In an action for the price of certain cotton cloth, of a common grade well known in the general market, which was alleged to have been sold and delivered to the defendant, it appeared that the cloth was to be manufactured by the plaintiff and to be packed in bales which were to be numbered by the plaintiff, beginning with a number named by the defendant, that by the original agreement a definite quantity of the goods was to be shipped or ready for shipment by a common carrier in each week, and that, after a part of the goods had been shipped, the defendant wrote the plaintiff a letter containing the direction, "Please hold shipments of [the specified goods] covered by insurance, subject to our order," and in another letter referred to such goods as "held for our account," that the plaintiff continued to manufacture the goods called for by the contract, packed them in bales, numbered the bales according to the defendant's directions, stored

them in the plaintiff's storehouse, insured them, and held them subject to the defendant's order, in each instance notifying the defendant and sending him an invoice. At the time of these transactions the sales act had not gone into effect. *Held*, that it might have been found that the plaintiff impliedly was authorized by the defendant to appropriate the goods for him when ready for delivery, and that the placing of the numbers upon the bales in accordance with the requirement of the contract and putting the bales in the plaintiff's storehouse were evidence of such an appropriation, which could be found to be a constructive delivery.

CONTRACT, with two counts, the first for the price of certain cotton cloth alleged to have been sold and delivered to the defendant, and the second for an alleged breach of contract by the defendant in refusing to accept and pay for certain cotton cloth which it had agreed to buy from the plaintiff. Writ dated October 12, 1908.

In the Superior Court the case was tried before *Keating, J.* The plaintiff and the defendant were both manufacturing corporations, the plaintiff owning and operating a large cotton mill in New Bedford and the defendant owning and operating a large cotton mill in Fall River. The evidence included the report of an auditor, William H. Fox, Esquire, and also correspondence and oral testimony. The facts which could have been found upon the evidence are stated in the opinion. The auditor reported that the plaintiff under its first count could recover on the first eight items of its bill of particulars, amounting to \$13,563.44. He reported that there was no evidence before him in regard to the market value of the goods at the time and place of delivery, and that therefore the plaintiff was entitled to recover only nominal damages on its second count. For that he added \$1, finding that the plaintiff was entitled to recover in all \$13,564.44 with interest from the date of the writ.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Aside from the auditor's report there is no evidence in this case that twelve hundred pieces of goods were delivered by the plaintiff to the defendant on March 31, nor that any goods were delivered by the plaintiff to the defendant after the twelve hundred pieces on April 7.

"2. On all the evidence in the case, the plaintiff is not entitled to recover for the following items: [enumerating seven items.]

"3. The defendant is not liable for any goods except those delivered at the Arkwright Mills or to a common carrier to be forwarded to the Arkwright Mills.

"4. Even if the Arkwright Mills requested the Bristol Mill to hold the goods covered by insurance subject to its order, that would not change the rule as to delivery.

"5. The letter of April 1, 1908, from the Arkwright Mills to the Bristol Mill which has been put in evidence, does not vary the terms of delivery as stated in the contract, but is in effect a request to withhold deliveries. It does not warrant the Bristol Mill in recovering the purchase price of goods held in accordance therewith but not delivered."

The judge refused to make any of these rulings and submitted the case to the jury with other instructions.

The defendant excepted to the instructions on the ground that as to the goods held at the Bristol Mill there was no evidence of constructive delivery as defined by the court. The jury returned a verdict for the plaintiff in the full amount claimed; and the defendant alleged exceptions.

A. J. Jennings & I. Brayton, for the defendant.

J. C. Bassett, for the plaintiff.

RUGG, C. J. This is an action of contract to recover for goods sold and delivered and for damages for breach of contract for the sale of goods. There was evidence tending to show that the plaintiff agreed, by a broker's "sale note," to make and deliver to the defendant fifteen hundred thousand yards of cotton cloth. The quality, weight, price, terms and rate of delivery were fixed, and the note further contained these provisions: "No marks of any kind on bales, except bale numbers. Arkwright will let you know what bale number to begin with." The defendant gave to the plaintiff the bale number with which to begin numbering the bales. After about five hundred thousand yards were delivered according to the contract, which the defendant resold without examination, it began selling to the Merrimack Manufacturing Company. The cloth was rejected by it as not being of the required quality. Thereafter examinations were made, and negotiations were carried on between the defendant, the plaintiff and the Merrimack Manufacturing Company, to the end that the goods might be accepted under the contract between the defendant and the Merrimack Manufacturing

Company, which continued for about six weeks, beginning with March 16. These efforts failed, and on or about the first of May the Merrimack Manufacturing Company cancelled its contract with the defendant, and the defendant in turn its contract with the plaintiff, on the ground that the goods were not of the required quality. While these negotiations were pending and while it was in doubt whether the Merrimack Manufacturing Company would continue to accept the goods, the defendant wrote to the plaintiff on April 1 the following: "Please hold shipments of 28" goods, covered by insurance, subject to our order. Will let you know the result of our examination as soon as completed;" and on April 28: "Please ship at once 1200 pieces billed April 7 held for our account. They are going over the goods at the Merrimack Mfg. Co.'s and expect to let you know the result in a day or two." After April 1 the plaintiff continued its manufacture of the goods according to its contract, baled them and numbered the bales according to the previous directions of the defendant, stored them in its storehouse, insured them, and held them according to the instructions contained in the defendant's letter of April 1, notifying the defendant in each instance and submitting an invoice. There was no difference in the insurance on these goods and other goods in the plaintiff's storehouse. The case was sent to an auditor. His report and the verdict of the jury were for the plaintiff.

The inquiry is whether this evidence was sufficient to show a delivery of the goods between April 1 and the time when the defendant cancelled the contract. This must be answered without reference to the sales act,* which did not go into effect until several months after the events here in issue.

The sale note required a delivery by the plaintiff to a common carrier for shipment to the defendant. It is admitted that no such delivery was made. The first question is whether the defendant's letter of April 1, which was received and accepted by the plaintiff, constituted a modification of the contract as to delivery. The contract between the plaintiff and the defendant was in no wise dependent upon the relations between the defendant and the Merrimack Manufacturing Company. A

* See St. 1908, c. 237, § 19, Rule 4.

breach by the latter of its contract with the defendant affords no justification for a cancellation by the defendant of its contract with the plaintiff. The letter of April 1 should be read in the light of all the conditions then known to the plaintiff and the defendant. The defendant contends that so read it should be construed to mean a request to withhold or to hold back shipments pending the negotiations with the Merrimack Manufacturing Company, and that the contract should remain in abeyance meanwhile. But the letter is something more than a mere request to suspend shipments. It is a direction that the goods be covered by insurance. This was an act of proprietorship under all the circumstances. If title remained in the plaintiff, there was no occasion for the defendant to be concerned about the insurance. It is only on the theory that the defendant expected title to vest in it that its reference to insurance becomes reasonable. *Weed v. Boston & Salem Ice Co.* 12 Allen, 377. The defendant's further request that the goods be held subject to its order looks in the same direction. Its letter of April 28 directing shipment of certain goods previously billed "held for our [its] account" tends to indicate a reference to goods owned by it. The fair meaning of the letter of April 1 is a request for a modification of the original contract as to delivery of the goods to a common carrier with an additional stipulation as to insurance. When accepted by the plaintiff, the contract was changed to that extent. The precise form in which the insurance was carried by the plaintiff does not appear, but no exception is taken on this point, and after verdict it must be assumed that it conformed to the letter of April 1.

The question remains whether there was sufficient evidence of a separation and an appropriation by the plaintiff of the goods to constitute a constructive delivery. The cloth seems to have been of a common grade well known in the general market, and such as the defendant also manufactured. It was not an unusual kind made upon special order. The manufacture was completed, and nothing remained in order to execute the contract on both sides, except for the buyer to take the goods and pay for them. A definite quantity of goods was to be shipped or ready for shipment each week. Under these circumstances as between the immediate parties nothing was necessary in order to pass title to the buyer

beyond a setting apart of the goods for the buyer. It might have been found that the seller was impliedly authorized to make such appropriation by the buyer. Title may pass although the goods remain in the actual possession of the vendor. *Goddard v. Binney*, 115 Mass. 450. *Mitchell v. Le Clair*, 165 Mass. 308, 310. *Barrie v. Quinby*, 206 Mass. 259, 266. The evidence was that the plaintiff placed numbers upon the bales in accordance with the requirement of the sale note and put them in its storehouse. Any visible marks which are sufficient for identification are enough to show an appropriation. Each bale was a physical entity. When it was stamped or marked with a serial number conforming to an initial number furnished by the defendant, it could be identified readily in a storehouse where there were other bales. It was not necessary that all the bales should be set apart in a group by themselves. The appropriation was complete without it. *Scudder v. Worster*, 11 Cush. 573, 576. *Sanger v. Waterbury*, 116 N. Y. 371.

It follows that the defendant's requests for rulings were refused rightly, and that there was no error in the charge.

Exceptions overruled.

EDMOND COTE vs. NEW ENGLAND NAVIGATION COMPANY.

Bristol. October 29, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCEY, JJ.

Evidence, Judicial records, Presumptions and burden of proof. *Practice, Civil*, Exceptions. *Payment*, By another. *Satisfaction of Claim*, On judgment against another.

In an action in which the proceedings at the trial of a previous action in a court of record are material, the judge or magistrate before whom the previous action was tried cannot be allowed to testify that a certain motion was made at that trial which the record does not show to have been made.

An exception by a defendant to the erroneous admission at a trial of evidence introduced by the plaintiff will not be sustained, if the evidence erroneously admitted related only to a defense which, if this evidence had been excluded, would not have been supported by the evidence of the defendant.

In an action of contract, where the only defense relied upon is that the plaintiff received full satisfaction of his claim upon a judgment obtained by him in a previous action against a different defendant, the burden of proving such defense is upon the defendant, and it is not enough for him to show by the record

in the former action that the issue in question might have been litigated and decided in that action. In order to prevail he must show that in the former action in which judgment was recovered and satisfied the same issue was in fact litigated and determined.

In an action against a common carrier for the loss of a log of veneer of the value of \$62, the only defense relied upon was that the plaintiff had received full satisfaction of his claim upon a judgment obtained by him in a previous action against another carrier, to which the defendant was not a party. The defendant put in evidence the record of the previous action, by which it appeared that the declaration in that action contained three counts, the first in contract for the loss of the same log of veneer valued at \$62, the second in contract for the loss of oak stain of the value of \$13.50, and the third in tort for the alleged conversion of both the log and the oak stain. The record further showed a general judgment for the plaintiff in the sum of \$13.50 and judgment satisfied. *Held*, that this evidence did not warrant a finding that the plaintiff had received payment for the log for the loss of which he sued the defendant.

CONTRACT for \$62 as stated in the opinion. Writ in the Second District Court of Bristol dated June 19, 1911.

On appeal to the Superior Court the case was tried before *Fox*, J., without a jury. The judge found for the plaintiff in the sum of \$65.72; and the defendant alleged exceptions to the admission of the evidence which is described in the opinion. It was stated in the bill of exceptions that the defendant waived all questions except those relating to the defense that the plaintiff had recovered judgment, which had been satisfied, in an action against the New York, New Haven, and Hartford Railroad Company for the same cause of action. That action was brought in the Second District Court of Bristol and was tried before one of the special justices of that court, who was the witness referred to in the opinion.

A. W. Blackman, for the defendant.

A. S. Phillips, for the plaintiff, submitted a brief.

RUGG, C. J. This is an action of contract. The declaration alleges that the defendant as a common carrier received a log of veneer of the value of \$62 shipped to the plaintiff, which it failed to deliver. The only defense now material is that the plaintiff had sued the New York, New Haven, and Hartford Railroad Company for the same cause of action, wherein the plaintiff recovered judgment which had been satisfied. The defendant admitted that it transported the veneer. It was undisputed that previous to the present action the plaintiff had brought an action against the New York, New Haven, and Hartford Railroad Company, in

which the declaration was in three counts, the first in contract alleging failure as a common carrier to deliver to the plaintiff the log of veneer valued at \$62, the second count also in contract for failure as common carrier to transport oak stain to the value of \$13.50, and (the plaintiff alleging doubt whether his action sounded in tort or contract) a third count in tort alleging conversion of both the log of veneer and the wood stain, the respective values of which were averred to be the same as in the contract counts. The log of veneer referred to in that declaration was the same as that which is the subject of the present action. The defendant offered in evidence the full record of the earlier action, which showed judgment for the plaintiff in the sum of \$13.50, and judgment satisfied. The plaintiff called as a witness the magistrate before whom that action was tried. Subject to the exception of the defendant, he read from a paper in his possession, which was a motion by the plaintiff to discontinue his action as set forth in the first count, and testified that the paper was left with him by the plaintiff's attorney at the trial of the action. Ascertaining on June 17, 1912, that this paper bore no file mark, he directed the clerk of the court to file the paper, and caused the docket to be amended accordingly, and that the paper was in truth filed on June 19, 1911, which was the date of the trial of that action. The duly certified copy of the record in evidence did not show the filing or allowance of any such motion or any other motion affecting the declaration or the plaintiff's claims under it at the trial. It is to be observed that this testimony did not relate to the matters actually tried out and decided in the action, but merely to the court record. Plainly, the admission of this evidence was improper. It was said in *Wells v. Stevens*, 2 Gray, 115, 117: "No principle is more firmly established than that which excludes oral testimony when offered to vary or contradict written judicial records. The record of a court of competent jurisdiction imports incontrovertible verity, as to all the proceedings which it sets forth as having taken place, and is of so high a nature that no averment can be made against it." The record failed to show the presentation or allowance of the motion, and no parol evidence was admissible to amplify, modify or contradict it. This rule is based upon considerations of public policy, and is too well established to require discussion. *Kelley v. Dresser*, 11 Allen, 31. *Lund v. George*, 1 Allen, 403.

Sayles v. Briggs, 4 Met. 421. *Speirs Fish Co. v. Robbins*, 182 Mass. 128.

But the defendant fails to show that it has suffered injury. The defendant, in support of its plea of former judgment and satisfaction, offered no evidence except the record. From this it appeared that the action was not between the same parties as those to the present act on. Hence the general rule, that a judgment on its merits in a former action between the same parties is a bar, as to every issue which in fact was or in law might have been litigated, to later action upon the same cause, has no application. There is nothing to indicate that the present defendant is a privy of the defendant in the earlier action. Apparently they are strangers. The defense is different in kind, and is founded on another rule, to the effect that a plaintiff cannot obtain twice satisfaction for the same debt or wrong. The plaintiff as a shipper of merchandise can have but one satisfaction of the debt or claim due to him for the failure to deliver his property, which the defendant undertook to transport as a common carrier. If his cause of action sounds in contract and both the defendant and the New York, New Haven, and Hartford Railroad Company have been guilty of a breach resulting in the same harm to the plaintiff, there can be but one satisfaction of the obligation. *Gilmore v. Carr*, 2 Mass. 171. *Savage v. Stevens*, 128 Mass. 254, and cases cited. *Stimpson v. Poole*, 141 Mass. 502, 504. *Simpson v. Mercer*, 144 Mass. 413. *Vanuzem v. Burr*, 151 Mass. 386. *Burnham v. Windram*, 164 Mass. 313, 316. *New York Bank Note Co. v. Kidder Press Manuf. Co.* 192 Mass. 391, 408. *Crow v. Bowlby*, 68 Ill. 23. *Jenners v. Oldham*, 6 Blackf. 235. If it sounds in tort and both defendants have joined in the wrong, separate judgments may be had against each wrongdoer, though there can be but one satisfaction. *Corey v. Havener*, 182 Mass. 250. The decisions of this court go rather far in holding satisfaction of the plaintiff's claim by a stranger a bar in favor of the defendant. The present case raises no question of wrongful or fraudulent recovery by the plaintiff in the earlier action. If it be assumed in favor of the defendant that payment of the plaintiff's claim for the log of veneer by the New York, New Haven, and Hartford Railroad Company would be a bar to the present action, the defendant must fail.

The defense that the plaintiff had already received satisfaction of his debt or claim was an affirmative one, and the burden of proving it rested on the defendant. All it did was to introduce the record of an action, in which the present plaintiff was the plaintiff and another common carrier was the defendant, and in which the declaration sufficiently alleged, by two separate counts in contract, failure to deliver two distinct articles of merchandise and alternatively by one count in tort conversion of the same articles, in which the judgment was general and in which there was satisfaction. One only of these articles was the same as the subject of the present action. This evidence did not sustain the burden of proof as to the issue raised by the defendant. It did not show that the plaintiff had already received payment of the claim sought to be enforced against the defendant. It well might have been that the only issue tried and settled in the earlier case related to the other articles of merchandise and not to that now in litigation. So far as the exceptions show anything touching that matter, they indicate that the value of the log of veneer was not recovered in the earlier case. It is stated that previous to or at the trial of the action against the New York, New Haven, and Hartford Railroad Company the plaintiff was advised that that carrier did not transport and had no connection with the log of veneer, and that at the trial the defendant made a motion that the court direct a verdict for the defendant. The declaration in that case alleged in detail the value of the log of veneer to be \$62, and that of the wood stain to be \$13.50. The judgment for the plaintiff was for \$13.50 debt or damage. These facts together with the record fail to furnish ground for the inference that the plaintiff has received satisfaction for the claim which he now seeks to recover from this defendant.

When the second action is not between the same parties or does not relate to exactly the same claim or demand, then the effect of the previous judgment and its satisfaction can extend no further than the issue in fact litigated and determined. When the record does not demonstrate what issues actually were tried and decided, they may be shown by extrinsic evidence. When a record of an action between a plaintiff and another defendant is offered as a bar against the plaintiff on the ground that he has been paid in full for his claim, it must be shown what was the demand or claim upon

which he actually recovered and for which in fact he has been paid. It is not enough to show those which might have been litigated or decided. Sometimes this may appear on the record itself. But it does not in the present case. The party upon whom rests the burden of proof must introduce evidence to show that the matters in truth tried and settled in the earlier case were the same as those sought to be tried again in the second case, before it can be said that the satisfaction of the earlier judgment proves or warrants a finding that the plaintiff has been paid for the claim sought to be recovered in the second action. *Lea v. Lea*, 99 Mass. 493. *Foye v. Patch*, 132 Mass. 105. *Roach v. Roach*, 190 Mass. 253. *Corbett v. Craven*, 196 Mass. 319, 322. *Newhall v. Enterprise Mining Co.* 205 Mass. 585. *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, and cases cited at 257.

The result is that the defendant failed to make out any defense under its answer of satisfaction of judgment for the same claim, and hence suffered no injury by the error in the admission of evidence.

Exceptions overruled.

MAURICE S. LUMIANSKY vs. OZI TESSIER.

Bristol. October 29, 1912. — November 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Landlord and Tenant, Repairs, Eviction. *Theatre. Covenant. Practice, Civil*, Consolidation of cases, Discontinuance, Parties. *Equity Pleading and Practice*, Consolidation of cases, Decree.

Where real estate is leased to be used for a vaudeville and moving picture show, and the lease contains a statement that "a license, for operating a vaudeville and moving picture show on the premises as now equipped, has been obtained," and also contains a covenant by the lessee that the premises "shall be kept in good and tenantable repair and condition during the term of said lease at the expense of the lessee," the lessor to make outside repairs, and thereafter the State police notify the lessor that certain interior changes must be made in the theatre under penalty of a revocation of the license if not made, and the lessee knows of these requirements, but the changes are not made and the license is revoked, the revocation of the license, which is due to the failure of the lessee to perform his obligations under the lease, gives him no claim upon the lessor and does not excuse him from his obligation to pay the stipulated rent.

A covenant of the lessor in a lease of certain real estate "that the heating apparatus to be connected with and used in the premises hereby leased and demised shall be installed at the expense of the lessor" does not require a heating apparatus to be installed on the premises, and may be performed by the installation in the cellar of an adjoining building belonging to the lessor of a heating apparatus connected with and sufficient to warm the demised premises.

Where the lessor of a theatre during an inspection of the theatre by the State inspector ordered the lessee off the premises and was the aggressor in a controversy with the lessee in which they came to blows and the lessee was expelled, but the lessor did not intend permanently to evict the lessee, his purpose being to keep the lessee away from the inspector rather than out of the building, and the acts of the lessor did not deprive the lessee of the beneficial use of the premises after the inspection, such temporary forcible expulsion of the lessee does not constitute an eviction.

Discussion by RUGG, C. J., of three different methods by which cases at law and in equity may be consolidated.

In a suit in equity by a lessee against his lessor, to enjoin the defendant from collecting any rent until he should perform the covenants and conditions of the lease according to the contention of the plaintiff, it appeared that the plaintiff had brought an action at law against the defendant for damages from an alleged breach of the covenants of the lease, and that the defendant had brought an action at law jointly against the plaintiff and a guarantor of the rent for damages from the plaintiff's alleged breach of the covenant to pay rent. An interlocutory decree in the suit in equity, made with the consent of all the parties, ordered that the two actions at law "be consolidated with this proceeding and damages assessed herein, should any be found due; and that said two actions be heard with this suit at a session of the court without juries." The cases were referred to a master, who filed in the suit in equity a single report covering the matters in issue in all the cases. The final decree ordered that in the suit in equity the bill be dismissed, that in the plaintiff's action at law judgment be entered for the defendant, and that in the defendant's action at law, which the defendant had discontinued as against the plaintiff, judgment be entered against the guarantor of the rent. *Held*, that the consolidation of the cases by the interlocutory order was merely for convenience of trial, and that the two actions at law had not become merged in the suit in equity but still were pending, so that the separate judgments properly could be given in them.

The plaintiff in an action at law against two defendants may discontinue his action as against one of them after a hearing by an auditor but before the case has been tried on its merits.

Whether a lessor in an action for rent due under a covenant in a lease properly can join as defendants the lessee and one who guaranteed the payment of the rent under a separate instrument, *quaere*.

RUGG, C. J. This is a suit in equity growing out of a written lease of certain premises to be used for a vaudeville and moving picture show. The lease was dated on the third day of May, 1909, for a term of three years from the tenth day of the same month. Among other clauses the lease contained these provi-

sions: "the premises, including the furniture and fixtures, shall be kept in good and tenantable repair and condition during the term of said lease at the expense of the lessee, reasonable use and wear thereof excepted . . . the lessor shall keep in repair the outside parts of the premises herein leased . . . the heating apparatus to be connected with and used in the premises herein leased and demised shall be installed at the expense of the lessor, not later than October 1, 1909. . . . The lessor hereby covenants . . . that the premises, as so equipped, have been inspected and passed by the proper authorities; that a license, for operating a vaudeville and moving picture show on the premises as now equipped, has been obtained."

The plaintiff brought an action at law against the defendant for damages alleged to have arisen from a breach of the covenants of the lease, and the defendant commenced an action against the plaintiff and one Barnard Lumiansky for breach of covenants in the lease and for failure to pay rent. The three cases were tried together before a master,* who, in accordance with the order entered by consent of all parties, filed in the suit at bar a single report covering matters in issue in all the cases. A final decree† was entered, from which the plaintiff and Barnard Lumiansky appealed.

At the time of the lease the building was not completed, but the building was licensed until August 1, 1909. St. 1908, c. 335. Before the expiration of that license the State inspector of the Massachusetts district police required certain work to be done in order to complete the building. This was done by the lessor, and thereafter another license was issued, which by its terms ran to August 1, 1910. Both these licenses were in the name of the owner of the building. Shortly thereafter the State police notified the lessor that certain interior changes must be made in the theatre, with the suggestion that if they were not made he should recommend the revocation of the license. No notice was given to the lessee by the inspector or by the lessor, but the master finds that the lessee knew these requirements, and made no effort to put the premises in condition to meet them. On November 4, 1909, the license was revoked, and on February 11, 1910, the bill in equity was filed, praying that the defendant should be enjoined from

* L. Elmer Wood, Esquire.

† Made by Fox, J.

collecting any rent until he should perform the covenants and conditions of the lease. On October 26, 1911, the plaintiff filed a supplemental bill, alleging an eviction on August 24, 1910.

The plaintiff has argued that, inasmuch as the license was issued to the lessor, his failure to see that it was continued in force was a breach of the lease, invoking the rule that although the lessor undertook the work gratuitously, he is liable for failure in its performance. But this rule does not apply. Whether the license is one which should be issued to the owner of the building or to the occupant is of no consequence. The lease contains no covenants on the part of the lessor that the license shall be continued in force. The cause of its revocation was a failure to make repairs, changes and alterations in the interior of the theatre, the obligation to do which under the terms of the lease rested on the lessee. For failure to perform his own obligations the plaintiff cannot hold the lessor responsible. This branch of the case is within the authority of *Taylor v. Finnigan*, 189 Mass. 568.

One of the matters specified by the inspector of the district police was an improper system of ventilation. As to this the master found that the ventilator openings as planned and constructed by the lessor were under the stage, and that at the request of the lessee they were placed over the stage, but upon condition that if they were not right the lessee would be obliged to alter them at his own expense, to which condition the lessee assented. For such a change plainly the lessor is not responsible under his lease. The lessee also excepts to the finding that the heating apparatus, which was installed in the cellar of premises belonging to the lessor and adjoining the leased premises, was a compliance with the terms of the lease. But the lease did not require a heating apparatus to be installed on the premises. It was only to be connected with and adequate for the purpose of warming the demised premises. The master finds that in this respect the apparatus was sufficient. The lessee had an implied license to use the premises where the heating apparatus was located, although not included in the demised premises, so far as necessary to enable him to warm the building. The fact that stores in the theatre building were connected by piping is now of no consequence, because no complaint was made on this ground until after the actions were brought; and the master has found that the stores might easily

have been disconnected by the lessee on the demised premises at small expense. Although the premises were not completed at the time of the lease, the master finds that they have been substantially completed, and that the plaintiff has suffered no injury thereby.

The plaintiff's contention that he was evicted from the premises is not supported by the findings of the master. The fact that during an inspection of the theatre by the State inspector the lessor ordered the lessee from the premises and was the aggressor in a trouble in which the parties came to blows is not enough, because the lessee was not deprived of any substantial beneficial use of the premises, and there was no intent on the part of the lessor permanently to evict him. While a landlord must be presumed to intend the natural consequences of his conduct, all the circumstances must be taken into account in determining whether there has been an actual expulsion of the tenant with the intent and effect of depriving him of the enjoyment of the demised premises or some substantial part of it. *Skally v. Shute*, 132 Mass. 367. *McCall v. New York Life Ins. Co.* 201 Mass. 223. *Voss v. Sylvestor*, 203 Mass. 233. The violent expulsion of the tenant from the premises may have been found under all the circumstances to disclose no intent to deprive the lessee of possession, but merely to have been for the purpose of preventing his conversation with the inspector.* It cannot be said that this inference was wholly unwarranted.

The contention cannot be sustained that the guaranty on which action was brought against Barnard Lumiansky was extinguished by a later guaranty for a larger amount signed by Barnard Lumiansky and one Mechaber. There is nothing to show that this may not have been a cumulative guaranty, leaving the earlier one in full force. It is not necessary to discuss in detail the other exceptions taken by the lessee. None of them can be supported, for the reason that they relate to matters about which the findings

* The master found "that the lessor's action in trying to keep the lessee out was caused by fear that the lessee would prejudice the inspector against reporting favorably on the application for the theatre license, and that his purpose was to keep the lessee away from the inspector rather than out of the building." He found that these acts of the lessor did not deprive the lessee of the beneficial use of the premises after the inspection, and that the lessor did not intend by his action permanently to evict the lessee.

of the master on questions of fact, the evidence not being reported, are final and cannot be disturbed.

The plaintiff raises a question of practice. The final decree provides that the suit in equity be dismissed with costs, and that in the common law action of the plaintiff against the defendant judgment shall be entered for the defendant with costs up to the date of an order consolidating the common law case with the suit in equity, and finding that in the action at law of the defendant against the plaintiff and Barnard Lumiansky a debt is established of \$1,800 with interest, and further that Tessier, having discontinued his action against the present plaintiff, the defendant in that action, judgment for \$1,000, which is the amount of his guaranty, is to be entered against the other defendant, Barnard Lumiansky. The plaintiff argues first that this decree is erroneous, on the ground that the two actions at law having been consolidated with the suit in equity, there was thereafter but one case pending, and all issues must be settled in a single decree. The interlocutory order, upon the interpretation of which the decision of this point depends, after describing the two actions at law and reciting that the order was entered by consent of the counsel in the equity suit and in the two actions at law, provided that the two actions at law "be consolidated with this proceeding and damages assessed herein, should any be found due; and that said two actions at law be heard with this suit at a session of the court without juries." No question arises as to the authority of the court to enter such an interlocutory order *in invitum* because this was made by consent of all parties. It was made by the Superior Court in the exercise of its powers as a court of general jurisdiction, and not by virtue of any statute. The practice respecting consolidation of actions is regulated by statute in the federal courts and in several State courts. Statutes have been enacted in this Commonwealth from time to time enlarging the rights of parties to join in a single proceeding, and extending the power of the court to fix costs to the end of preventing a multiplicity of actions. See R. L. c. 48, §§ 20-24, 29, 107; c. 173, §§ 1, 2; c. 189, § 32; c. 197, § 11; c. 203, §§ 8, 9. But there is no statute covering the general subject of consolidation of actions in this Commonwealth, and a practice has grown up adapted to the accomplishment of justice according to varying circumstances.

The phrase, "consolidation of cases," has been used in three different senses:

(1) Where several cases are pending upon different causes of action, involving in substance but one question, a court has inherent power to prevent the scandal to the administration of justice which would result from a trial of each case separately, and as one method of avoiding it may stay proceedings in all cases but one, and see whether the disposition of that one may not settle the others. Without tracing its history, this procedure is now firmly settled as a part of the common law. It appears often to be resorted to in England. *Amos v. Chadwick*, 4 Ch. D. 869; *S. C.* 9 Ch. D. 459. *McHenry v. Lewis*, 22 Ch. D. 397. *Bennett v. Lord Bury*, 5 C. P. D. 339. *Briggs v. Gaunt*, 4 Duer, 664. *Tidd's Practice*, (4th Am. ed.) 614, 615. This course has not been much followed in this Commonwealth, but there is no reason to doubt its soundness in law and its feasibility in cases to which it is applicable.

(2) Where several causes are pending between the same or different parties which grow out of a single transaction or which involve an inquiry into the same event in its general aspects, although the details of evidence may vary materially in fixing responsibility, the court may order them tried together. But they continue separate so far as concerns docket entries, verdicts, judgments and all aspects save only the one of joint trial. This is a frequent practice, and finds many illustrations in our decisions. *Burke v. Hodge*, 211 Mass. 156, and cases collected at 159. *Commonwealth v. Robinson*, 1 Gray, 555, 560. *Commonwealth v. Seeley*, 167 Mass. 163. It is to a consolidation of this kind that reference was made by Mr. Justice Gray in *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, in saying at p. 293, "But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments." The effect of a consolidation of this character was stated by Lurton, Circuit Judge, in *Toledo, St. Louis & Kansas City Railroad v. Continental Trust Co.* 36 C. C. A. 155, at p. 164, (95 Fed. Rep. 497, 506,) as follows: "Such consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of

the court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other, unless so directed." *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U. S. 208, 212. *Benton v. Barnet*, 59 N. H. 249. *American Window Glass Co. v. Noe*, 86 C. C. A. 133; 158 Fed. Rep. 777. *Butler v. Evening Post Pub. Co.* 78 C. C. A. 511; 148 Fed. Rep. 821. *Burnham v. Dalling*, 1 C. E. Green, 310. *Mowry v. Davenport*, 6 Lea, 80, 91.

(3) When several cases are pending which might have been made the subject of a single suit or action, the court may enter an order which shall fuse the several proceedings into a single one. The original actions lose their identity and become merged into the one in which alone the rights of the parties will be determined. Thereafter they are conducted not as separate and distinct actions or suits, but as one. In suits in equity, where there are several different parties but the same *res* is the subject of the litigation, or where there is such identity in the nature of the proceeding, the interests of the parties or the relief to be afforded as to require or render highly expedient a unification of divers proceedings, an order of consolidation in appropriate instances may bring all into one suit. *Smith v. Butler*, 176 Mass. 38, illustrates this kind of consolidation. See other instances arising generally under statutes: *Brewer*, Circuit Judge, in *Mercantile Trust Co. v. Missouri, Kansas & Texas Railway*, 41 Fed. Rep. 8; *Holthaus v. Nicholas*, 41 Md. 241, 265; *Pioneer Fuel Co. v. St. Peter Street Improvement Co.* 64 Minn. 386; *Midland Railway v. Island Coal Co.* 126 Ind. 384; *Wolters v. Rossi*, 126 Cal. 644; *Harris v. Wicks*, 28 Wis. 198, 202; *Lookout Lumber Co. v. Sanford*, 112 N. C. 655, 658; *Handley v. Sprinkle*, 31 Mont. 57.

It is manifest, from the tenor of the interlocutory order in this case, that consolidation of actions there was used in the second sense indicated above. It was a mere convenience that the three causes were tried together. The last sentence of the order describes the two actions at law as still pending, and does not direct a merger of all three into one. Moreover, appropriate remedy cannot be awarded in one suit alone. The defendant prevailing in

his action against the plaintiff can be afforded no affirmative relief in this suit.

It follows that the present defendant in his action against the present plaintiff and Barnard Lumiansky had a right to discontinue his action against the present plaintiff. A plaintiff in equity may not have his suit dismissed as of right on paying costs after hearing begun either before a master or the court or the doing of some other thing which would prejudice a defendant's rights or which in any way would be inequitable to him to have go for naught. *Kyle v. Reynolds*, 211 Mass. 110, and cases cited. *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299. But it is settled that in an action at law a plaintiff may discontinue or become nonsuit after a hearing before an auditor, but before a trial on its merits. *Derick v. Taylor*, 171 Mass. 444. *Carpenter & Sons Co. v. New York, New Haven, & Hartford Railroad*, 184 Mass. 98. *Schenck v. Boston Elevated Railway*, 207 Mass. 437. *Snow v. Revere Rubber Co.* 211 Mass. 82, 86. The discontinuance by Tessier of his action against Maurice S. Lumiansky, after the hearing before the auditor or the prosecution of it against Barnard Lumiansky alone* falls under the latter rule. It is probable that, as matter of law, he could not maintain a joint action against the lessee and one who became guarantor under a separate instrument for the rent reserved in the lease. *Wallis v. Carpenter*, 13 Allen, 19. See *Roth v. Adams*, 185 Mass. 341; 20 Cyc. 1484. No error in this respect appears on the face of the decree.

Decree affirmed with costs.

F. A. Milliken & A. W. Milliken, for the plaintiff.

E. Higginson, for the defendant.

* In this action at law the two defendants filed separate answers, each alleging that he was joined improperly with the other, and both defendants made the same objection at the hearings before the master.

FRED L. CRESSEY vs. JOB H. CRESSEY & others.

Essex. November 6, 1912. — November 27, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Practice, Civil, Appeal, Memorandum of judge, Exceptions, Report. *Partition*.

No appeal lies to this court from the findings of fact or the rulings of law made by a judge before whom a proceeding at law has been tried without a jury, nor from an order to enter an interlocutory judgment where no such judgment has been entered.

A memorandum filed by a judge before whom a proceeding at law has been tried without a jury, which states his findings of the material facts in the case and his rulings of law upon them without embodying them in a bill of exceptions or a report, is not a part of the record.

It seems, that upon a petition for partition, questions of law raised by the rulings of a judge upon the facts found by him at a hearing of the case without a jury, on which he ordered that an interlocutory judgment should be entered, may be brought before this court by a bill of exceptions before the case is ripe for final judgment; or such questions of law may be brought before this court by a report made by the judge under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5.

RUGG, C. J. This case is not before us properly. It is a petition for partition. A hearing was had before a judge of the Superior Court,* who filed a careful statement of the whole case and of his conclusions, entitled "Findings by the Court." This was a finding of the material facts and his rulings of law upon them. Its concluding words were "Interlocutory judgment to be entered in accordance with the foregoing findings." But no such judgment has been entered. Two of the respondents appealed "from the findings of the court . . . and . . . from the conclusions of the court as expressed in said finding, and from the judgment and decree made or authorized by said findings."

A bare memorandum by a judge sitting without a jury in a proceeding at law forms no basis for an appeal grounded on an error of law and cannot be considered as a part of the record, however useful it may be for the information of the parties and as a foundation for other steps in the case. *Regal v. Lyon*, 212 Mass. 230, and cases cited. *Lopes v. Connolly*, 210 Mass. 487,

* *McLaughlin, J.*

496. This is a proceeding at law and not in equity, where in this respect the rule is different. *Cohen v. Nagle*, 190 Mass. 4.

Errors of law under these circumstances can be taken advantage of only by a bill of exceptions. *New York Life Ins. Co. v. Macomber*, 169 Mass. 580. Findings of fact embodied in a bill of exceptions or a report of course are a part of the record. It has been settled practice for a long time that this court has no jurisdiction to consider an appeal until there has been a judgment. *Cotter v. Nathan & Hurst Co.* 211 Mass. 31, and cases cited.

If exceptions had been filed, even though the case was not ripe for final judgment, they could have been considered for the reason that a petition for partition is a peculiar proceeding and a judgment for partition is in a sense final. *Lowd v. Brigham*, 154 Mass. 107. See also *Hutchins v. Nickerson*, 212 Mass. 118, 120.

The questions of law raised by the rulings upon the facts found by the judge of the Superior Court might have been brought to this court also by report under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5.

But as the jurisdiction of this court is affected by the error in bringing the case here in this way we are compelled to send it back.

Appeal dismissed.

H. R. Mayo, for the respondents Anna E. Emerson and Sarah E. Newhall.

W. E. Dorman, for the respondent Charles A. Newhall.

G. C. Richards, for the petitioner.

PATRICK HURLEY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 11, 1912. — November 27, 1912.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions, Rulings and instructions.

An exception, to the disallowance of a bill of exceptions on the ground that the exceptions were not taken within a reasonable time after the rulings excepted to were made, properly can be alleged in a separate bill of exceptions.

An adverse finding by a trial judge, who has heard a case without a jury, without

passing upon pertinent requests for rulings, is to be construed as a refusal of the rulings thus requested.

Exceptions to the refusal of requests for rulings involved in the finding of a trial judge, who heard the case without a jury, must be taken within a reasonable time after the filing of such decision. Eighteen days after notice of the filing of the decision is not a reasonable time.

RUGG, C. J. This case was tried before a judge of the Superior Court* sitting without a jury. On the last day of the trial the plaintiff presented requests for findings of fact and for rulings of law which were taken under advisement. At that time he saved no exceptions and expressed no oral or written desire to have exceptions saved for him in the event that the judge should refuse to give any or all of his requests. Four days later a finding for the defendant was filed, and notice thereof was sent at once to the plaintiff's attorney and was received by him on the following morning. No further action was taken until eighteen days later, when a bill of exceptions was filed. Some of the plaintiff's requests were given and others refused, but no ruling to this effect was filed with the finding. This bill of exceptions was disallowed because (according to the certificate of the judge) "no exception was claimed until the bill was filed and 18 days after plaintiff's counsel was notified of the decision in the case, and therefore said exceptions were not alleged within a reasonable time."

The plaintiff's exception to this ruling is to be decided. It is a proper subject for a bill of exceptions. *Purcell v. Boston, Halifax & Prince Edward Island Steamship Line*, 151 Mass. 158.

The plaintiff's original bill of exceptions was disallowed rightly. The difference between taking an exception and filing a bill of exceptions is plain. The saving of the exception is the substance. The bill of exceptions is the formal expression of that substance. It can recite only that which has been done. No rule of court or statute expressly defines the time within which exceptions must be taken to a ruling made in the absence of counsel in a trial without a jury. Therefore in such instances the exception must be taken within a reasonable time after the ruling.

A finding could not have been made until the requests had been passed upon. An adverse finding without specifically passing upon pertinent requests for rulings is to be construed as a denial

* *Crosby, J.*

of them. *John Hetherington & Sons Co. v. William Firth Co.* 210 Mass. 8.

The failure to take any action toward saving exceptions for eighteen days after notice of the decision was not saving exceptions within a reasonable time. This point is concluded by *Graves v. Hicks*, 194 Mass. 524, and *Richards v. Appley*, 187 Mass. 521.

Exceptions overruled.

The case was submitted on briefs.

W. O. Childs, for the plaintiff.

A. E. Pinanski & G. E. Morris, for the defendant.

ISAAC FRANK & another, petitioners.

Suffolk. November 11, 1912. — November 27, 1912.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions. Rules of Court.

Under St. 1911, c. 212, § 2, where the judge who presided at a trial, upon a motion made more than three months after the filing of exceptions which have not been presented for allowance, orders that the exceptions be dismissed and that judgment be entered in the same manner as if no exceptions had been filed, on the ground that the exceptions were not presented to the court for allowance within such time as the court finds to be reasonable, the determination by the judge that there has been unreasonable delay is final and is not open to revision.

Rule 64 of the Superior Court, regulating the practice under St. 1911, c. 212, § 2, and providing that, where exceptions have remained without any action thereon for three months after filing, the clerk shall notify the parties, and that, if such exceptions are not presented for allowance within thirty days thereafter, they shall be dismissed as of course unless an order is made extending the time for hearing and allowance, does not prevent the granting of a motion to dismiss such exceptions, which was filed after the expiration of the three months but before thirty days thereafter had elapsed, upon the decision of the trial judge that the delay in the presentation of the exceptions for allowance was unreasonable.

RUGG, C. J. This is a petition to establish the truth of exceptions. The defendants seasonably filed exceptions, and on the seventeenth day of February, 1912, the plaintiff moved to dismiss

them, alleging that the defendants had "failed for an unreasonable length of time to present . . . said exceptions for allowance." After a hearing, the judge of the Superior Court* found that "upon the circumstances disclosed at the hearing of the motion, the case comes within the spirit and letter of the St. of 1911, c. 212, § 2. The exceptions were filed November 1, 1911. They were not presented to the court for allowance within such time as the court finds reasonable under the circumstances. . . . No good reason appears why the appellants should have further time to draft an amended bill of exceptions." Thereupon the exceptions were dismissed, and judgment was entered upon the verdict as if no exceptions had been alleged and filed.

St. 1911, c. 212, makes important changes in the practice respecting the allowance of exceptions. It provides that after exceptions have been filed, either party may present them to the presiding judge for examination and hearing as to conformability to truth. If the excepting party does not so present them within such time as the court deems reasonable, the court may order them dismissed and enter judgment as if no exceptions had been filed, but such action cannot be taken sooner than three months after the date of their filing. The determination by the presiding judge of the question whether there has been unreasonable delay on the part of the excepting party in presenting and pressing the exceptions for allowance is final. His decision is not open to review. There is nothing inconsistent with this result in Rule 64 of the Superior Court, adopted January 6, 1912, to regulate the practice under St. 1911, c. 212. The effect of that rule is that after exceptions have remained for three months without action they will be dismissed as matter of course at the end of thirty days more, unless special order to the contrary is made. It provides for an automatic dismissal of exceptions in cases falling within its terms. It is a determination that commonly thirty days in addition to the three months required by the statute is a reasonable time within which to present exceptions to the court. The rule does not prevent the filing of a motion for the dismissal of the exceptions after the expiration of the three months and before thirty days have elapsed, nor does it deprive the court of the power of deciding what may be a reasonable time in particular instances.

* *King, J.*

There is an allegation in the petition, in substance, that the exceptions were presented to the presiding judge, and were not restored to the files with a certificate allowing or disallowing them. R. L. c. 173, § 107. If this allegation means anything more than that the clerk presented the exceptions to the court according to the practice before the enactment of St. 1911, c. 212, this fact was found against the petitioner by the judge of the Superior Court, as appears by his certificate. Such decision cannot be revised. Although the statute makes important changes, apparently it was passed for the purpose of preventing the unreasonable delays in pressing exceptions for allowance illustrated in *Meehan, petitioner*, 208 Mass. 60, and to extend the power of courts to prevent appeals or exceptions from becoming instruments of unjust delay. See R. L. c. 173, § 115; *Daly v. Foss*, 209 Mass. 470. It must be interpreted in such manner as to effectuate this purpose.

Petition dismissed.

J. H. Blanchard, for the petitioners.

S. L. Bailen, for the respondent.

DANIEL MAHONEY, administrator, *vs.* BOSTON ELEVATED
RAILWAY COMPANY.

Suffolk. November 15, 1912. — November 27, 1912.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions. Evidence, Remoteness. Negligence, Evidence of negligence on other occasions.

In an action by an administrator for causing the death of the plaintiff's intestate, who was a child less than three years of age, the jury returned a verdict for the plaintiff, and the plaintiff, deeming the amount of the verdict insufficient, alleged exceptions to the admission of certain evidence introduced by the defendant to show negligence on the part of the mother of the plaintiff's intestate who was in charge of her at the time of the accident. *Held*, that it was not necessary to consider the competency of the evidence, because it had no bearing on the question of damages and its admission could not have injured the plaintiff.

In an action by an administrator against a corporation operating a street railway

for causing the death of the plaintiff's intestate by alleged negligence in the operation of a car of the defendant, it is proper for the presiding judge to exclude upon the issue of damages the question, asked by the plaintiff on the cross-examination of a witness called by the defendant, referring to the operation of cars at the place of the injury, "What have you noticed as to cars going along that particular stretch?" Because the only culpability of the defendant's servants material upon the question of damages is negligence upon the occasion when the accident occurred.

TORT, by the administrator of the estate of Margaret Mahoney, for causing the death of the plaintiff's intestate, a child two years and eleven months of age, on July 15, 1910, on North Beacon Street in that part of Boston called Brighton, by alleged negligence in the operation of an electric street railway car of the defendant. Writ dated October 3, 1910.

At the trial in the Superior Court before *Morton, J.*, the jury returned a verdict for the plaintiff in the sum of \$500; and the plaintiff alleged exceptions, relating solely to the alleged wrongful admission of certain evidence introduced by the defendant and the alleged wrongful exclusion of a question asked by the plaintiff on the cross-examination of a witness called by the defendant, both of which are described sufficiently in the opinion.

J. E. Crowley, for the plaintiff.

F. Ranney & T. Allen, Jr., for the defendant, were not called upon.

RUGG, C. J. This is an action of tort to recover for the death of the plaintiff's intestate, a child too young to be capable of exercising care for her own safety, caused by the negligence of the defendant's servants or agents in charge of its cars. Certain evidence tending to show carelessness on the part of the mother, who was in charge of the plaintiff's intestate, was admitted subject to the plaintiff's exception. It is not necessary to discuss the competency of the evidence for it is plain that even if wrongly received the plaintiff has suffered no harm. The verdict was in his favor. The jury must have found that the mother exercised due care. The evidence had no bearing on the question of damages, and hence could have had no effect on the verdict and could not have injured the plaintiff. *Todd v. Boston Elevated Railway*, 208 Mass. 505.

It was proper to exclude the question asked in the cross-examination of a witness called by the defendant: "What have you noticed as to cars going along that particular stretch?" re-

ferring to the place of the injury. The defendant (if other elements of liability were established) was bound to respond in damages to be determined solely with reference to the degree of culpability of its servants in charge of its car on the particular occasion in question, without regard to other instances of care or culpability.

Exceptions overruled.

EARL MOWER vs. DANIEL B. BEARD, executor.

Essex. November 7, 1912. — December 2, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Appeal.

An appeal to this court in an action at law brings before the court only errors of law apparent on the record.

CONTRACT for \$102.50 with interest from February 1, 1910. Writ in the District Court of Southern Essex dated January 15, 1912.

The defendant filed a plea in abatement alleging that the defendant at the time the action was brought was not living within and had no usual place of business within the jurisdiction of the court.

On April 1, 1912, the case was entered on appeal in the Superior Court. On June 18, 1912, *Hall, J.*, made an order overruling the plea in abatement. On July 15, 1912, the defendant filed an appeal from the order overruling his plea in abatement.

The defendant's general answer, not waiving his plea in abatement, contained a general denial and an allegation of payment. The case was heard on the merits by *McLaughlin, J.*, without a jury. On September 19, 1912, he found for the plaintiff in the sum of \$119.19.

On September 20, 1912, the plaintiff filed a motion that the defendant's claim of appeal, filed July 15, 1912, from the order of June 18, 1912, overruling the defendant's plea in abatement, be stricken from the docket. This motion was allowed by *McLaugh-*

lin, J., on the day that it was made. On October 7, 1912, the defendant appealed from the order allowing the plaintiff's motion to dismiss the defendant's claim of appeal.

D. B. Beard, *pro se*, submitted a brief.

S. H. Hollis, (R. T. Parke with him,) for the plaintiff.

Rugg, C. J. Assuming (but without so deciding) in favor of the defendant that his appeal was seasonably taken and properly entered here, no error is shown. The plea in abatement raised an issue of fact. The action of the Superior Court in overruling it presents no question of law. An appeal in an action at law brings before this court only errors of law apparent on the record. *Electric Welding Co. v. Prince*, 200 Mass. 386, 392.

Appeal dismissed with double costs.

UNION TRUST COMPANY vs. WILLIAM S. REED & others.

Worcester. September 30, 1912. — December 4, 1912.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DeCOURCY, JJ.

Tax, Sale: redemption. Equity Jurisdiction, To redeem land from tax sale. Equity Pleading and Practice, Decree, Cross bill. Words, "Owner."

- A suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale of which the plaintiff had notice less than four months before the filing of the bill, may be brought by a prior attaching and judgment creditor of the owner to whom the tax was assessed, the words, "any person having an interest in any such land" in § 61 including an attaching creditor, whether the word "owner" in § 59 includes an attaching creditor or not.
- A suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale, which was made more than two years before the filing of the bill but of which the plaintiff had notice less than four months before the filing of the bill, was brought by a prior attaching and judgment creditor of the owner to whom the tax was assessed, against such owner, the purchaser at the tax sale and two other attaching creditors. One of the prayers of the bill was that the court should "determine the rights of the three attaching creditors and the order and amount due each." There was nothing to show that the two defendant attaching creditors did not know of the tax sale at the time that it was made or that either of them had taken any steps to protect his rights, and neither of them had filed a cross bill. *Held*, that, although the plaintiff's ignorance of the tax sale until a short time before the filing of his bill made it equitable that he

should be given a right to redeem, such right was confined to the protection of his own interest acquired by attachment, and that the defendant attaching creditors could be given relief only upon their filing cross bills and showing themselves to be entitled to it.

The proper way for a defendant in equity to obtain affirmative relief is by a cross bill.

BILL IN EQUITY, filed in the Superior Court on April 8, 1910, under St. 1909, c. 490, Part II, § 76, by an attaching judgment creditor of the defendant Reed, to redeem certain land in Leominster from a tax sale made on February 11, 1907, for non-payment of taxes assessed to the defendant Reed as the owner of the land on May 1, 1905, the bill alleging that the plaintiff was ignorant of the default in the payment of taxes and of the sale for non-payment thereof until December 31, 1909, when the plaintiff first had notice of such default and sale after the legal period of redemption had expired.

The case came on to be heard by *Hall, J.*, and in accordance with an agreement of all the parties was reserved and reported by the judge under R. L. c. 159, § 29, upon the pleadings and an agreed statement of facts for determination by the full court.

A. J. Young, for the plaintiff.

W. H. King, Jr., (*E. H. Vaughan* with him,) for the defendant Bascom.

J. L. Hall, F. W. Knowlton & E. S. Kochersperger, for the defendants Ella P. Peters and the Westinghouse Electric and Manufacturing Company, submitted a brief.

RUGG, C. J. This is a suit in equity under St. 1909, c. 490, Part II, § 76, for the redemption of land sold for taxes. The plaintiff, who at the time of the tax sale was an attaching and judgment creditor of the owner and holder of the legal title of certain land, sues the owner, two other attaching creditors and the purchaser of the land at a tax sale. The primal question is whether the plaintiff as creditor, who prior to the sale had attached as security for his debt the land of the owner and person assessed, may maintain this proceeding. The answer depends upon the construction to be given to the words, "The owner of land taken or sold for payment of taxes" as used in R. L. c. 13, § 58, as amended by St. 1905, c. 325, § 1, and the words, "Any person having an interest in any such land" as used in St. 1902, c. 443, (now respectively § 59 and § 61 of Part II, c. 490, St. 1909,) which define the persons

entitled to redeem land sold for unpaid taxes. Generally tax redemption statutes, being remedial in their nature, are interpreted liberally in favor of a person seeking to recover his land, and the word "owner" in this connection has received a broad rather than a narrow meaning. It is the policy of the law to favor redemption from tax sales. But it is not necessary to decide whether the word "owner" is broad enough in its significance to include an attaching creditor, because we are of opinion that he comes within the descriptive phrase of the statute, "any person having an interest in any such land." Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right. No reason appears for placing upon the words of the statute a strict interpretation in the present instance. The word "owner" has been employed in St. 1905, c. 325, § 1, and statutes which have preceded it for many years, and still is retained. It appeared in the earlier enactments governing the section now being considered. But in R. L. c. 13, § 60, the word "owner" was omitted, and the words, "any person having an interest," were substituted. This change is too radical to warrant the assumption that no alteration of meaning was intended. It indicates a design to enlarge the scope of the right of redemption. Although the section in its main features affords a cumulative and not an exclusive method of redemption, this does not prevent it from effecting also an extension of the persons who may avail themselves of its remedy by the wider description of those to be benefited. The difficulties in the way of attributing this meaning to the words used are less than those encountered in adopting the opposite course of holding that it was intended only to be a phrase equivalent to the word "owner" construed in its technical sense. If necessary we should prefer the view that the statute meant rather to define "owner" in § 59 as meaning "any person having an interest in lands," thus following some courts and text-book writers.

It remains to consider the form and extent of relief. The agreed facts show that the plaintiff was ignorant of the tax sale, which occurred in February, 1907, until December 31, 1909, and brought

the present bill within less than four months thereafter. These circumstances make it equitable that it should be given a right to redeem. But the plaintiff's right to redeem is only for the purpose of protecting its interest acquired by attachment, and does not extend beyond this for the profit of itself or others. Its right of redemption is no more than coextensive with its claim. Inasmuch as this suit is brought after the expiration of the two years within which redemption may be had as of right, the general equities of all the parties will be considered. No direct benefits ought to accrue to those whose rights are barred at the expense of those against whom directly they have no remedy. There is nothing in the record to show that there are any equities in favor of the defendant Reed. No reason appears why he should not be barred of all right to redeem under the general two year statute of limitations. St. 1909, c. 490, Part II, § 59. So far as he is concerned, the equities of the purchaser at the tax sale are superior.

The plaintiff's bill sets out certain facts touching the other attaching creditors, and one of its prayers is that "the court determine the rights of the three attaching creditors and the order and amount due each." But it does not allege sufficient facts nor do they appear in the agreed statement to indicate equities superior to those of the purchaser at the tax sale in favor of the other two attaching creditors. For aught that is shown each of them may have known of the tax sale, and taken no steps to protect his rights. If this should be found to be the situation, there are no greater equities in their favor than in favor of Reed. It is of no significance that judgment in favor of one of them was not entered until long after the tax sale. The right of redemption exists under the statute in favor of the attaching creditor, who must proceed to assert his right of redemption, as would any one else entitled to redeem.

The other attaching creditors, defendants herein, have not filed cross bills, nor have they set forth by answers and substantiated after full trial claims for equitable relief without objection. See *Perego v. Dodge*, 163 U. S. 160, 164; *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 196, 221. The proper way for a defendant in equity to put himself in a position to demand a decree for affirmative relief in his favor is by a cross bill. *Braman v. Foss*,

204 Mass. 404, 411, and cases there cited. *Bassill v. Bassill*, 207 Mass. 365. *Holbrook v. Schofield*, 211 Mass. 234, 237. If the other attaching creditors file cross bills (permission being hereby given to do so) and show themselves entitled to a relief upon further hearing, an appropriate decree for their benefit may be entered. In any event, the defendant Bascom, the purchaser at the tax sale, should be permitted, at his election, to discharge the plaintiff's lien created by its attachment, and that of such other of the attaching creditors, if any, as may be found entitled to relief. If he declines to do this, then the plaintiff or such other attaching creditor, if any, as may prove his right thereto, may redeem. Upon such redemption a commissioner may be appointed by the court to sell the real estate conveyed by the tax deeds for the satisfaction of the claims (including the amount paid for redemption) of the creditors, in the order of priority and the payment of the excess, if any, to the defendant Bascom. If the other attaching creditors do not file cross bills within thirty days from the filing of this rescript, a decree may be entered granting relief to the plaintiff alone.

Ordered accordingly.

ELIZA DELVAL *vs.* OSCAR D. GAGNON & another.

Bristol. October 28, 1912. — December 11, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DeCOURCY, JJ.

Husband and Wife. Equity Jurisdiction, To reach and apply equitable assets, Equitable lien. Equitable Lien. Attorney at Law.

Money lent by a woman, as the administratrix of an estate, to a man whom she afterwards marries may be recovered from her husband by one to whom she has assigned the claim after her marriage.

It here was assumed, without deciding it, that a claim upon a verdict against a defendant in an action of tort for the conversion of personal property, on which no judgment has been entered, is property, which, in a suit in equity brought under R. L. c. 159, § 3, cl. 7, by a creditor of the plaintiff in the action of tort, can be reached and applied to the payment of a debt due from such plaintiff.

An agreement made by the plaintiff in an action of tort for the conversion of personal property, who has obtained a verdict on which no judgment has been entered, with the attorney at law who conducted the case for him, that the proceeds of the judgment about to be entered on the verdict shall be taken by the attorney

on account of such plaintiff's indebtedness to him for services and disbursements in that and other litigation, with the intention of giving the attorney a charge upon this specific fund as security for the sum due him, creates as between the parties a right in the nature of a lien enforceable in equity, and, where there is no intimation that the agreement was made in bad faith, the claim upon the verdict, thus appropriated to the payment of the debt to the attorney, cannot be reached and applied by a suit under R. L. c. 159, § 3, cl. 7, to the payment of a debt due to another creditor of such plaintiff.

BILL IN EQUITY, filed in the Superior Court on August 8, 1911, under R. L. c. 159, § 3, cl. 7, by the assignee, under an assignment in writing from Julie Monneret, otherwise Julie Gagnon, as the administratrix of the estate of Louis Monneret, of a claim against the defendant Gagnon, seeking to reach and apply to the payment of the plaintiff's claim a verdict, and the judgment about to be entered thereon, in favor of the defendant Gagnon against the defendant Legare.

The case was submitted to *Crosby, J.*, upon an agreed statement of facts, as follows:

The Julie Monneret referred to in the plaintiff's bill was the wife of the defendant Gagnon. Her real name was Julie Gagnon. She was married to the defendant Gagnon on January 25, 1906. She previously had been married to one Louis Monneret, who died intestate on August 10, 1904, leaving as his heirs and next of kin Julie Monneret and one minor son, Gaston Monneret. Julie Monneret was appointed administratrix of her deceased husband's estate on September 2, 1904. No inventory or account ever was filed by her in the Probate Court. As such administratrix she had funds in her hands amounting to about \$2,000. In August, 1905, she lent the defendant Gagnon \$300. In October and December, 1905, the defendant Gagnon repaid \$100 of this amount. In February, 1906, she lent the defendant Gagnon, to whom she then was married, \$110 out of the funds of the estate of Louis Monneret as the defendant Gagnon knew.

On July 12, 1907, Julie Gagnon brought a libel for divorce, which on March 10, 1908, was dismissed. On March 19, 1908, she brought in the Probate Court a petition for a decree that she was living apart from her husband, the defendant Gagnon, for justifiable cause, and for an allowance. This petition was heard in the Probate Court, and, on appeal of the defendant Gagnon, in the Superior Court, and a decree was made as prayed for.

Subsequently other proceedings and hearings were had in the Probate Court on the matter of the allowance. On June 17, 1907, Julie Gagnon, under the name of Julie Monneret, brought a suit in equity, as administratrix of her former husband's estate, in the Superior Court against her husband, the defendant Gagnon, for money lent. In this suit the defendant demurred, alleging that the plaintiff could not maintain the suit against her husband. The demurrer was sustained and the plaintiff appealed. The plaintiff failed to enter her appeal, and a final decree dismissing the bill with costs was entered on November 11, 1910.

On October 8, 1908, the defendant Gagnon obtained a verdict for \$175 damages against the defendant Legare, a deputy sheriff, in an action of tort for conversion for attaching household furniture in the above suit of Monneret v. Gagnon. Exceptions were filed by the defendant Legare, on the allowance of which hearings were had. The exceptions were not allowed and finally were waived, and judgment was entered on October 2, 1911.

In all of these proceedings L. Elmer Wood, Esquire, an attorney at law, appeared as counsel for the defendant Gagnon. There was due to him from the defendant Gagnon, apart from taxable costs, for disbursements made by him for the defendant in the case of Gagnon v. Legare, \$4.46, and for services as such attorney rendered in that case, \$79. There also was due him for services as such attorney and disbursements in the other proceedings mentioned above the sum of \$185.83.

In June, 1911, the defendant Gagnon proposed to his attorney Mr. Wood that the latter should take the proceeds of the judgment to be obtained in the action against the defendant Legare, and apply it to the amount due to Mr. Wood from Gagnon for services and disbursements in the case against the defendant Legare and for all other amounts due as aforesaid from Gagnon to Mr. Wood. This proposition was accepted by Mr. Wood.

On July 22, 1911, Julie Gagnon, under the name of Julie Monneret, was by license of the Probate Court authorized to sell and assign her claim as administratrix against her husband, the defendant Gagnon, for money lent, and on that day by an assignment, a copy of which was annexed to the bill, she assigned the claim to the plaintiff in this case.

The defendant Gagnon had no other goods or effects.

The judge found and ruled that the plaintiff was not entitled to the relief prayed for in her bill, and ordered that a decree be entered dismissing the bill. From the decree entered in accordance with this order the plaintiff appealed.

The case was submitted on briefs.

D. R. Radovsky & F. A. Pease, for the plaintiff.

L. E. Wood, for the defendant Gagnon.

DECOURCY, J. This is a bill to reach the verdict obtained in the action of Gagnon *v.* Legare and to apply it in satisfaction of a debt alleged to be due from Gagnon to the plaintiff Delval. The case is here on an appeal from the decree of the Superior Court dismissing the bill.

Unquestionably the balance due upon the loan made by Mrs. Gagnon to the defendant Gagnon before her marriage to him can be recovered by her assignee; and that exceeds the amount of the verdict. *MacKeown v. Lacey*, 200 Mass. 437. *Crosby v. Clem*, 209 Mass. 193.

Further, we assume, without deciding, that the verdict in the Legare case is "property" of Gagnon that can be reached by equitable attachment under R. L. c. 159, § 3, cl. 7. A right of action for personal injuries is not assignable either at law or in equity, and hence a verdict in such a case before judgment does not come within the operation of the statute. *Bennett v. Sweet*, 171 Mass. 600. But a right of action for a tortious act occasioning injury to property, such as the conversion of personal property, is assignable and can be reached and applied to the payment of debts. *Rice v. Stone*, 1 Allen, 566. *Pettibone v. Toledo, Cincinnati & St. Louis Railroad*, 148 Mass. 411. 4 Cyc. 24, and cases cited.

Nevertheless the trial judge was warranted in dismissing the bill. It appears from the statement of agreed facts that two months before the filing of this bill it was expressly agreed between Gagnon and his attorney Mr. Wood that the proceeds of the judgment about to be obtained in the action against Legare should be taken by Wood on account of Gagnon's indebtedness to him for services and disbursements in that and other litigation. It was not a mere promise to pay the attorney out of the proceeds of the judgment. Even without the agreement he would have a lien for his fees and disbursements in that action. R. L. c. 165, § 48. *Bruce v. Ander-*

son, 176 Mass. 161. There appears with reasonable certainty an intention to give to Wood a charge or incumbrance upon this specific fund as security for the sum due him; in fact as the indebtedness exceeded the amount of the verdict and judgment, there was virtually an appropriation of the fund to him. As between the parties this created in favor of Wood a right to have the identical fund subjected to the payment of his debt; — a right in the nature of a lien and enforceable in equity. 3 Pom. Eq. Jur. § 1235. *Coram v. Davis*, 209 Mass. 229. *Westall v. Wood*, 212 Mass. 540. The plaintiff cannot avail herself of the fact that notice of this equitable lien was not given to the debtor Legare. Nor is there any suggestion in the agreed facts that the agreement whereby the fund in question was to be regarded as security for the indebtedness of Gagnon was made in bad faith, or for the purpose of defeating the rights of other creditors. As between the rights of the present plaintiff and those of Wood, no such superior equities are shown in her favor as would entitle her in these proceedings to reach and appropriate this special fund.

Decree affirmed.

JACOB KRYZMINSKI vs. PATRICK J. CALLAHAN.

Hampden. September 24, 1912. — January 2, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Lord's Day. Agency. Practice, Civil, Rulings and instructions.

The appointment on Sunday of an agent to execute on Monday a contract to sell certain land is void as the transaction of secular business on the Lord's day. At the trial of an action for the alleged breach of a contract in writing to sell certain land to the plaintiff, where there is evidence that the only authority of the person who signed the contract as the agent of the defendant was derived from his appointment by the defendant on Sunday, but the defense of the Lord's day act is not pleaded, if the judge instructs the jury in regard to the effect of the Lord's day act upon the contract, he properly cannot refuse to instruct them that, if the authority of the alleged agent was given by the defendant on Sunday, the creation of such agency was void.

MORTON, J. This is an action of contract to recover damages for the breach of a written agreement dated September 19, 1910, and signed by one Lahey as the agent of the defendant, whereby

the defendant agreed to sell and the plaintiff to purchase on the terms therein specified, a certain parcel of land with the buildings thereon in the city of Chicopee. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge * to give certain rulings that were requested and to a portion of the charge.

The agreement relied on was dated and executed on Monday. But there was evidence tending to show that there were negotiations between the parties in regard to a sale and purchase on Sunday and that Lahey was constituted the defendant's agent on that day and authorized by him to represent and act for him in the execution of a binding agreement on Monday. And the principal question in the case relates to the refusal of the presiding judge to instruct the jury, as requested in substance and effect by the defendant, that, if Lahey's authority to sign the agreement on Monday was given to him by Callahan on Sunday, the creation of such agency on Sunday constituted the transaction of secular business on the Lord's day,† and was void.

The Sunday law was not pleaded by the defendant, nor, if that is material, was the statute of frauds. But the defendant expressly denied that Lahey was his agent for the purpose of signing the written agreement.

The presiding judge instructed the jury, amongst other things, that if the contract was made on Sunday it was void and could not be ratified; but that if the parties "afterwards met in their minds, after Sunday, and either by expression or by conduct traded, the fact that they had had some talk upon Sunday, and the fact that the things they were proposing to do by way of conditions of contract afterwards appeared in the memorandum, doesn't vitiate the contract, because that was made, if you should so find, upon a secular or week day." He further instructed them, "If you should find that the contract took place upon a week day, it is a good contract. If you should find that it took place upon a Sunday, it is a void contract. And in that view of the law it becomes to my mind immaterial, in view of the defendant's attitude in not setting up this statute, [meaning the statute of frauds] whether or not Lahey was authorized on a Sunday or not to

* *Hall, J.*

† R. L. c. 98, § 2, in this respect unchanged.

make the memorandum. If the contract was executed on a Sunday, it is void; if it was executed on a week day, it is good. And if Lahey was authorized by this defendant to sign that contract, and you find that the contract was made upon a week day, the defendant is silent with respect to the sufficiency of the memorandum. He doesn't plead it at all." Again in speaking of Lahey he said that, "If Lahey was the authorized agent of Callahan and made Callahan's trade, he had a perfect right to sign this paper on behalf of Callahan."

The action as already observed is to recover damages for breach of the written agreement. The agreement was signed not by the defendant himself, but by Lahey as his agent, and its validity depended upon Lahey's authority to sign for and on behalf of the defendant. The appointment by Callahan on Sunday of Lahey as his agent constituted the transaction of secular business on the Lord's day, and as such was void. *Clough v. Davis*, 9 N. H. 500. *Davis v. Barger*, 57 Ind. 54. *Saltmarsh v. Tuthill*, 13 Ala. 390, 403, 406. If, therefore, the only authority which Lahey had to sign the agreement for and on behalf of the defendant was that derived from his appointment by the defendant as his agent on Sunday, the authority was of no effect, and anything done pursuant to it would also be of no effect, and the jury should have been so instructed. Whether there was anything in the conduct of the defendant on and after Monday from which authority to Lahey to sign the agreement for and on behalf of the defendant or an adoption of the agreement could be inferred, would present a different question and one which was not considered, and which we do not pass upon. *O'Brien v. Shea*, 208 Mass. 528. The rulings requested were not refused on the ground that the Sunday law was not pleaded. On the contrary, the presiding judge went on, as we have seen, to instruct the jury as to the effect of the Sunday law, though not required to do so by the pleadings. Having undertaken to deal with the matter and having had his attention especially called to the effect of the Sunday law in regard to the matter of agency he was bound to instruct the jury in relation thereto.

Exceptions sustained.

M. L. Welcker, for the defendant.

T. A. McDonnell, for the plaintiff, submitted a brief.

LILLIE A. KEEPERS vs. HERMANN C. FLEITMANN & others.

Worcester. October 1, 1912. — January 2, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DECOURCY, JJ.

Mortgage, Of personal property. Sale, Conditional.

A person in possession of chattels as the vendee under a contract of conditional sale has a special property in them which he can mortgage.

Where the owner of personal property successively executes mortgages of it to two different persons, and neither of the mortgages is recorded within the time fixed by R. L. c. 198, § 1, if either of the mortgagees obtains delivery of the property from the mortgagor and thereafter retains it, his mortgage is valid against the other mortgagee.

Where the holder of an unrecorded mortgage of personal property takes possession of the property under a right given him by the mortgage, the property has been delivered to him within the meaning of R. L. c. 198, § 1.

In an action for the alleged conversion of certain personal property, which had been mortgaged by the owner successively to the plaintiff and to the defendant by mortgages which were not recorded as required by R. L. c. 198, § 1, if it appears that, after the defendant lawfully had taken possession of the property under his mortgage and had put a paid agent in charge of it, the plaintiff induced such agent to agree to hold the mortgaged property for the plaintiff under the plaintiff's mortgage and that such person who had been employed as the defendant's agent did thereafter hold possession for the plaintiff, this does not show a delivery of the mortgaged property by the mortgagor to the plaintiff within the meaning of R. L. c. 198, § 1; and, if the violation of the agent's duty to the defendant was procured for the plaintiff by the mortgagor, this does not better the plaintiff's position, because a delivery to one mortgagee of property taken out of the rightful possession of another mortgagee by the joint wrongful act of the recipient and the mortgagor is not a delivery within the meaning of that statute.

LORING, J. This is an action for the conversion of thirty-three knitting machines, admittedly personal property. The presiding judge * directed a verdict for the defendants on the plaintiff's evidence, and the case is here on an exception to that ruling.

The facts proved by the plaintiff were as follows: The machines were manufactured by the Wildman Manufacturing Company and sold to the Worcester Knitting Mills under a conditional contract of sale at some time before July 1, 1907. This conditional sale was not fully complied with until after the conversion here complained of, but the machines were not retaken by the vendor. On July 1, 1907, these machines were mortgaged to the plaintiff by

* Lawton, J.

the Worcester Knitting Mills to secure the payment of \$5,000, and in February, 1909, together with all the other property of the mills (except raw material and merchandise in process of manufacture) they were mortgaged to the defendants to secure the payment of \$55,130.37. In the summer of 1909 the Worcester Knitting Mills stopped and did not afterwards resume the operation of its factory; and on January 3, 1910, the defendants at a foreclosure sale under their mortgage sold these machines with the other property covered by it. Thereupon, on January 19, 1910, this action was brought for the conversion of the machines, and the foreclosure sale was relied on by the plaintiff as the act of conversion.

It is settled that a vendee of personal property in possession of it under a conditional contract of sale has a special property in it which he can mortgage. *Chase v. Ingalls*, 122 Mass. 381. *Dame v. Hanson & Co.* 212 Mass. 124. Neither of the mortgages in the case at bar was recorded within the time fixed by statute. R. L. c. 198, § 1. Under these circumstances, if either one of the two mortgagees obtained delivery of the property and thereafter retained it, his mortgage was valid. *Carpenter v. Snelling*, 97 Mass. 452. *Tatman v. Humphrey*, 184 Mass. 361, 362. Where a mortgagee having by virtue of his mortgage a right of possession takes possession, the property has been delivered to him within the meaning of the statute. *Tatman v. Humphrey*, 184 Mass. 361, 362. *Humphrey v. Tatman*, 198 U. S. 91.

The plaintiff's evidence showed that although the real estate of the Worcester Knitting Mills remained in its possession until the foreclosure sale on January 3, 1910, the defendants took possession of the machines here in question "in the early part of December," through one Crane, who was sent and paid by them for so doing. The plaintiff's contention is that her evidence warranted a finding that at the request of the plaintiff's husband Crane (hired by the defendants to keep possession for them) agreed to hold and did thereafter hold possession of the machines for the plaintiff, and that thereby the plaintiff's mortgage became and the defendants' ceased to be valid.

The provision of the statute (R. L. c. 198, § 1) is that if "the property mortgaged has been delivered to and retained by the mortgagee," the mortgage is valid "against a person other than

the parties thereto," as well as between the parties. The statute contemplates a delivery by the mortgagor to the mortgagee. As we have already stated, a delivery of possession is made out within the statute if possession is taken by a mortgagee under a right given him in the mortgage so to do. But in the case at bar, if the plaintiff obtained possession of these machines at all, she obtained it wrongfully through a violation of the duty which Crane owed to the defendants. On his own testimony the plaintiff's agent knew that Crane had been sent to take possession of these machines for the defendants, and yet (it is the plaintiff's contention) he induced Crane to turn over the machines to the plaintiff and thereafter to hold them for her while being paid to hold them for the defendants. As against the Worcester Knitting Mills (the mortgagor) the plaintiff had the right of possession. But as against the defendants who had legal possession, which possession was a rightful one, the plaintiff did not have a right to take possession. The plaintiff obtained physical possession (if she did obtain physical possession) by inducing the defendants' servant to give physical possession to her in violation of his (the servant's) duty to the defendants, his principal. Possession so obtained is wrongfully obtained, and as against the defendants is a wrongful possession. In our opinion possession so obtained is not the equivalent of a delivery of the mortgaged property by the mortgagor to the mortgagee within R. L. c. 198, § 1.

The plaintiff's position in the case at bar is not bettered by the fact that the plaintiff's agent (who procured the agreement by Crane to hold for the plaintiff in violation of the duty owed by him [Crane] to the defendants) was treasurer, president and general manager of the Worcester Knitting Mills. A delivery to one mortgagee of property taken out of the legal rightful possession of another mortgagee by the joint wrongful act of the mortgagee first named above and the mortgagor in our opinion is not a delivery within R. L. c. 198, § 1.

It becomes unnecessary to consider the other difficulties which lie in the way of the maintenance of the action on the evidence introduced by the plaintiff.

Exceptions overruled.

E. J. McMahon, for the plaintiff.

J. R. Thayer & H. H. Thayer, for the defendants.

COMMONWEALTH vs. JAMES MCGANN & another.

Middlesex. November 18, 1912. — January 2, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Theatre. License. Statute, Repeal. Constitutional Law. Words, "At their pleasure."

St. 1904, c. 450, which requires, in towns and in all cities other than Boston, that a license for the building in which a theatrical entertainment is to be given shall be obtained from the chief of the district police, does not dispense with the necessity of obtaining also from the mayor of the city or the selectmen of the town the license for such an entertainment required by R. L. c. 102, § 172, as amended by St. 1905, c. 341. Section 15 of St. 1904, c. 450, which repealed only so much of R. L. c. 102, § 172, as was inconsistent with the later statute, did not repeal the requirement of a license from the mayor or selectmen.

R. L. c. 102, § 172, providing, as amended by St. 1905, c. 341, that the mayor of a city or the selectmen of a town may grant a license for theatrical exhibitions and "may revoke or suspend such license at their pleasure," is constitutional as a proper exercise of the police power, the words "at their pleasure" meaning in the exercise of a wise discretion for the purpose of preventing theatrical performances which are injurious to the morals of the public.

The sixteenth article of the Declaration of Rights in the Constitution of this Commonwealth, which declares that "the liberty of the press" ought not to be restrained, has no application to the restraint of the oral publication of the text of a play in a theatrical performance.

COMPLAINT, received and sworn to in the Fourth District Court of Eastern Middlesex on May 15, 1912, charging the defendants with setting up and promoting an exhibition and public show at Woburn on May 7, 9, 11 and 14, 1912, without being licensed to do so.

The case went by appeal to the Superior Court. In that court the defendants filed a plea in bar, alleging that they were the lessees of a building in Woburn known as the Lyceum Hall Theatre, which had been licensed by the chief of the district police under St. 1904, c. 450, § 2, [St. 1905, c. 342, § 1,] on August 1, 1911, for a period of one year, and that theatrical shows were given by the defendants on the dates named in the complaint under authority of this license. The Commonwealth demurred to the plea. The demurrer was sustained by *McLaughlin, J.*,

who ordered the defendants to plead guilty or not guilty. The defendants excepted to this ruling.

The defendants then pleaded not guilty and were tried before *McLaughlin, J.* The essential facts were stated as agreed in a writing signed by the counsel for the defendants and the district attorney. The Commonwealth rested upon the agreed facts, which were read to the jury. The defendants then made an offer of proof, which is described in the opinion. The judge excluded the evidence offered, and the defendants excepted. The defendants then asked the judge to make certain rulings, including rulings that under St. 1904, c. 450, § 2, [St. 1905, c. 342, § 1,] the chief of the district police in all cities except Boston is the only person authorized to issue a license permitting a building of the character described in § 1 of that statute to be used for theatrical shows; that the license issued to the defendants by the chief of the district police authorized the acts mentioned in R. L. c. 102, § 173, and that any provisions of § 172 of that chapter inconsistent with St. 1904, c. 450, were repealed by § 15 of that statute; that R. L. c. 102, §§ 172, 173, are unconstitutional and void; and that those sections are contrary to article sixteen of the Declaration of Rights, a theatrical production being a publication of the text by word of mouth.

The judge refused to make any of the rulings requested and in substance instructed the jury "that the defendants could be convicted for giving a theatrical show in the building known as the Lyceum Hall Theatre in Woburn if in the giving of such theatrical shows the defendants had no license from the mayor of Woburn when such shows were given, and even though the defendants had a license from the chief of the district police for said Lyceum Hall Theatre." The defendants excepted to this instruction and to the refusal of the rulings requested.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

P. H. Kelley, for the defendants.

J. J. Higgins, for the Commonwealth.

LORING, J. 1. The effect of St. 1904, c. 450, was to require in towns and in cities other than Boston two licenses for a theatrical entertainment. One, to be issued by the chief of the district police, had to do with the safety of the public who attended

the performance. The other, to be issued under R. L. c. 102, § 172, by the selectmen or the mayor and aldermen (later under St. 1905, c. 341, by the mayor alone), had to do with the morals of the public who attended. Before the enactment of that act (St. 1904, c. 450), one license covering both aspects was to be issued by the mayor and aldermen or by the selectmen. The provision of St. 1904, c. 450, § 15, is that only "so much of section one hundred and seventy-two of chapter one hundred and two of the Revised Laws and of any other act as is inconsistent herewith is . . . repealed." The above is so plainly the true intent and effect of St. 1904, c. 450, that it is not necessary to state the act in detail. And without stating them in detail the subsequent acts (Sts. 1904, c. 460, § 4; 1905, cc. 341, 342; 1906, c. 105; 1907, c. 274; 1908, c. 385, § 2) recognize this. Requiring two licenses for the same act is not without precedent. See *Commonwealth v. Ellis*, 158 Mass. 555. The defendants put great reliance on the case of *Taxing District v. Emerson*, 72 Tenn. 312. In that case it was decided that under a statute requiring the owner of a theatre to pay a tax for the privilege of giving theatrical entertainments it was not necessary for persons employed by the owner for that purpose to pay a second tax. That does not help the defendants.

2. There can be no question of the constitutionality of the R. L. c. 102, § 172, so construed. Some theatrical performances are beneficial and some are injurious to public morals. It is within the limits of the police power to forbid the latter and to secure the former by requiring all theatres to be licensed by public officials who are authorized to revoke and suspend the license "at their pleasure," as is provided in R. L. c. 102, § 172. "At their pleasure" in that act means from time to time in the exercise of a wise discretion having in view the purposes sought by the act, namely, to prevent theatrical performances which are *contra bonos mores*. So construed, the act is not open to the objection stated in *Commonwealth v. Maletsky*, 203 Mass. 241, 246.

The defendant has contended, on the authority of *Dailey v. Superior Court*, 112 Cal. 94, that R. L. c. 102, § 172, is in violation of the rights guaranteed by the sixteenth article of the Declaration of Rights, which provides that "the liberty of the press is essential to the security of freedom in a State; it ought not,

therefore, to be restrained in this Commonwealth." What was decided in *Dailey v. Superior Court* was that under the Constitution of California it was not competent for a court to forbid a theatrical performance even if it would result in preventing a criminal trial then pending in its court from being a fair and impartial one. The provision of the Constitution of California there in question was in these words: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The reason for the result reached by a majority of the court in that case was that by the terms of that constitutional provision freedom of speech, including a theatrical performance, could be punished but could not be prevented. It is not necessary for us to decide whether we should agree with the conclusion reached by the majority in that case, for art. 16 of our Declaration of Rights is confined to "liberty of the press."

The defendants have further contended that if a business is so offensive that it should be prohibited it must be prohibited as to all or as to none, and that the decision in *Yick Wo v. Hopkins*, 118 U. S. 356, is a decision to that effect. If the defendants' contention is correct, a business which is an innocent one and even a public benefit on the one hand or a public evil on the other, according to the way in which it is conducted, cannot be regulated by requiring a license for carrying it on. The power of government under our Constitution is not so crippled. Of that there could be no doubt were the question *res integra*. In addition the practice of more than a hundred years and the decisions of this court are conclusive here against the contention. See for example *Commonwealth v. Davis*, 140 Mass. 485; *Commonwealth v. Plaisted*, 148 Mass. 375; *Quincy v. Kennard*, 151 Mass. 563; *Commonwealth v. Page*, 155 Mass. 227; *Commonwealth v. Parks*, 155 Mass. 531; *Commonwealth v. Abrahams*, 156 Mass. 57; *Commonwealth v. Ellis*, 158 Mass. 555; *Commonwealth v. Davis*, 162 Mass. 510; *Commonwealth v. Maletsky*, 203 Mass. 241, 247. There is nothing in *Yick Wo v. Hopkins*, 118 U. S. 356, to the contrary. That case was considered in *Commonwealth v. Parks* and *Commonwealth v. Abrahams*, *ubi supra*. What was decided in that case was that, taking the ordi-

nance there in question in connection with the way in which it had been enforced, it was an ordinance intended to be a discrimination against the Chinese on account of their race, and that that was a violation of the Fourteenth Amendment to the Constitution of the United States.

Lastly, the defendants have insisted that *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, is a decision which supports their contention that R. L. c. 102, § 172, is unconstitutional if construed to require a license from the mayor as well as a license from the chief of the district police. We see nothing in that decision which supports that contention. In that case it was decided, (first) that the board of registration in embalming created by St. 1905, c. 473, had no authority to provide that "no permits for removal, burial or disinterment" should thereafter be issued "to any person or persons who have not been registered and received a certificate from the State board of registration in embalming;" (second) that the respondent board of health of Cambridge, having refused to issue to the petitioner a license as an undertaker solely because of this void order of the board of registration in embalming, must be taken to have determined in their discretion that the petitioner was entitled to a license but for the void order and that under those circumstances a writ of mandamus should issue.

3. The defendants offered to prove: "That during the time Watts had control of the Lyceum Hall Theatre that one William P. Murray, the son of the mayor of Woburn, worked in said theatre, and that immediately after the defendants secured the lease from the owners of the said Lyceum Hall Theatre, on April 16, 1912, as the highest bidder over the said Watts, that the mayor of Woburn notified the defendants that they would get no renewal of their license in the Walnut Street Theatre, which expired on April 20, 1912, and that no license would be issued to the defendants for the Lyceum Hall Theatre." The learned counsel for the defendants stated that this evidence was offered "for the purpose of showing that the defendants had been unjustly discriminated against by the mayor of Woburn by his refusal to issue to them a license or to give them a hearing as to why a license should not be issued; and that the above evidence in connection with the conduct of the mayor of the city of Woburn,

as stated in the agreed facts, was competent evidence to show an unjust discrimination against the defendants in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as declared in the case of *Yick Wo v. Hopkins*, 118 U. S. 356." Of this offer of proof it is enough to say that there was no offer to prove the character of theatrical performances given by the defendants at the Walnut Street Theatre. In the absence of such evidence it could not be inferred that the mayor had not refused the defendants licenses for both theatres in the honest exercise of the discretion vested in him by R. L. c. 102, § 172. We do not intimate that if the evidence had gone further the defendants' contention would have been sustained.

Exceptions overruled.

WILLIAM F. BENNETT vs. KUPFER BROTHERS COMPANY.

Worcester. September 30, 1912. — January 3, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY & DE COURCY, JJ.

Contract, Performance and breach. Pleading, Civil, Answer. Evidence, Relevancy.

In an action against a corporation for the alleged breach of a contract in writing to employ the plaintiff as the general manager of a paper mill for a period of five years, where the contract provided that, in case the plaintiff's work as general manager should not be satisfactory, the defendant might give the plaintiff other work instead, and where it appears that the defendant gave notice to the plaintiff of such a change of work and that the plaintiff declined to accept such change, the defendant under a general denial may introduce evidence of damages suffered by the defendant through mismanagement of the plaintiff as tending to show that the plaintiff was deposed justifiably from the position of general manager because of his incompetence.

CONTRACT, for the alleged breach of a contract in writing, by which the defendant, a corporation, agreed to employ the plaintiff as the general manager of the defendant's paper mill at Riverdale, a village in the town of Northbridge, for a period of five years, with a provision for a graduated increase of salary as the profits of the business increased. Writ dated October 19, 1910.

A copy of the contract was annexed to the declaration. It was dated January 15, 1910. The defendant was the party of

the first part and the plaintiff the 'party of the second part. The clauses of the contract numbered 1 and 2 were as follows:

" 1. The party of the first part hereby employs the party of the second part for the term of five years ending on the 31st day of December, 1914, and the party of the second part agrees to enter and to remain in the employment of the party of the first part during said period.

" 2. The party of the second part agrees during said five years to devote all his time and attention to the interests of the party of the first part. The employment of the party of the second part shall be as general manager of the plant about to be completed and operated by the party of the first part, situated at North-bridge, Massachusetts, as long as his work as such general manager is satisfactory; but in case his work as such general manager shall not be satisfactory, the party of the first part reserves the right to give the party of the second part during the term hereof such reasonable directions to do such other work as in the discretion of the party of the first part, its board of directors and officers, is deemed proper."

The answer was a general denial. During the trial the defendant was allowed to amend its answer by adding the following paragraphs:

"And further answering the defendant admits the execution of the contract declared on by the plaintiff, but denies that the plaintiff performed his work as such general manager satisfactorily; and because of such failure to perform said work satisfactorily, the defendant, in accordance with the terms of said contract, duly gave the plaintiff such reasonable directions to do such other work as in the discretion of the defendant, or its board of directors and officers, was deemed proper.

"And further answering the defendant alleges that the plaintiff did not properly perform his contract, but that on the contrary he undertook to perform the same in such a negligent, unskillful and improper manner as to cause the defendant great and serious damage."

In the Superior Court the case was tried before *Irwin, J.* The general findings warranted by the evidence are stated in the opinion.

The defendant offered to show, on the question of satisfactory

performance by the plaintiff of his work as general manager, the salary list and the product of the plant for the time during which the plaintiff was general manager and for the time following October 1, 1910, which was the date of the severance of the plaintiff's connection with the defendant. The judge admitted the evidence bearing on the months during which the plaintiff was in charge as general manager, but excluded evidence of the salary list and the product of the plant for the time thereafter. The defendant excepted.

The defendant called as a witness its treasurer, one Bird. He was asked the following question: "As a result of Mr. Bennett's charge of the mill, from the beginning of the contract up to October 1st, have you made any computation as to any damages that this corporation suffered, if any, directly traceable to his action?" The witness answered, "Yes, sir." He then was asked, "And what are the different things that that embraces?" The plaintiff's counsel objected, saying, "I don't know whether it is in the nature of a recoupment. There is nothing in the pleadings about it." Thereupon the judge said, "I suppose showing Mr. Bennett's incompetency as to his position. It is going in piecemeal." The defendant's counsel stated as his reason for asking the question, "He goes there as superintendent, and has brought suit for damages for the breaking of the contract by us amounting to \$5,000. If we can show that during the time he worked for us he damaged us fifteen or twenty thousand dollars, the jury have a right to take the two sums into consideration." The judge excluded the question, and the defendant excepted. This is the second exception, which is referred to in the opinion as alone being material, the first not having been argued.

The defendant made no requests for rulings and did not except to any part of the judge's charge. The jury returned a verdict for the plaintiff in the sum of \$5,775; and the defendant alleged exceptions to the exclusions of evidence stated above.

The case was submitted on briefs.

F. B. Hall & J. H. Mathews, for the defendant.

C. C. Milton & F. L. Riley, for the plaintiff.

BRALEY, J. The defendant's exceptions relate to the exclusion of evidence, and the first exception not having been argued it must be treated as waived, leaving for decision the question

raised by the second exception. It is not suggested that the parties are at variance over the construction of the contract, and, the defendant having exercised the right reserved by the second clause, the plaintiff upon notice declined to accept the change in his employment, and claimed that the action taken, having been inconsistent and a mere subterfuge, constituted a breach by the company. The record, while stating that "there was evidence from which the jury could find a breach of contract on the part of the defendant," also contains enough recitals of the evidence from which the jury could have found a failure by the plaintiff to discharge satisfactorily the duties of general manager of the defendant's manufactory.

During the trial the defendant was permitted to plead in recoupment, which goes only to the reduction of damages and raises a defense not available under the original answer of a general denial. *Sawyer v. Wiswell*, 9 Allen, 39, 42. *Stacy v. Kemp*, 97 Mass. 166, 168. *Hodgkins v. Moulton*, 100 Mass. 309. *Carey v. Guillow*, 105 Mass. 18. *Jackman v. Doland*, 116 Mass. 550. The defendant, however, if it had prevailed, could not have had damages assessed caused by the plaintiff's breach, but would have been obliged to resort to an independent action. *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 417, 438, 439. *Munsey v. Butterfield*, 133 Mass. 492. *Jewett v. Brooks*, 134 Mass. 505. *Paige v. Barrett*, 151 Mass. 67, 68. *Snow v. Alley*, 156 Mass. 193. *Fort Payne Coal & Iron Co. v. Webster*, 163 Mass. 134.

But the plaintiff was required to show substantial performance on his part before he could recover, and, if the jury found that his displacement was justified, the defendant would have been entitled to a verdict. Under the general denial proof of the amount of damages suffered by his general mismanagement would have been relevant as tending to support the defendant's contention that he had been deposed because of incompetency. The plaintiff objected to a question which would have elicited from the defendant's treasurer evidence of this character, on the ground that recoupment had not been pleaded, and the judge excluded the question. It was wholly immaterial whether recoupment had then been pleaded, as the colloquy between the judge and the defendant's counsel, preceding the ruling, removes all doubt that the evidence was offered to show a breach of the

contract by the plaintiff; and, it having been admissible for the reasons stated, there must be a new trial.

Exceptions sustained.

CITY OF TAUNTON vs. COUNTY OF BRISTOL.

Bristol. October 29, 1912. — January 3, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Dog Officer. Officer. Statute, Construction.

In an action by a city in a county other than Suffolk against the county under the provisions of St. 1910, c. 629, for reimbursement of the amount of a bill for the services of a dog officer approved by the mayor and paid by the plaintiff, it appeared that the dog officer was appointed by the mayor on July 26, 1910. St. 1910, c. 629, which was the first statute authorizing such reimbursement, did not go into effect until July 15, 1910. R. L. c. 102, § 143, of which that statute is an amendment, provides that the mayor of each city shall appoint one or more dog officers "annually, within ten days after the first day of July." *Held*, that the requirement that the appointments shall be made within ten days after the first day of July is merely directory and not mandatory, and that St. 1910, c. 629 applies to payments made to dog officers who were appointed in the year 1910 after it went into effect.

In an action by a city of more than twenty-five thousand inhabitants in a county other than Suffolk against the county under St. 1910, c. 629, amending R. L. c. 102, § 143, as previously amended, for reimbursement of the amount of a bill for the services of a dog officer approved by the mayor and paid by the plaintiff, it appeared that the regular police officers of the plaintiff received as wages \$2.25 a day during their first year of service, \$2.50 a day during their second year of service, \$2.75 a day during their third year of service, and \$3 a day after four years of service, that the person paid as dog officer previously had served as a dog officer of the plaintiff for more than four years, and that his bill was approved for compensation at the rate of \$3 a day. *Held*, that, under the provision of the statute that in cities of twenty-five thousand inhabitants, or more, dog officers "shall be paid the same wages per diem during the term of their employment which the regular police officers of such cities receive," the bill of the dog officer properly was approved at the rate of \$3 a day for the period of his actual service as dog officer.

CONTRACT, by the city of Taunton against the county of Bristol, under St. 1910, c. 629, amending R. L. c. 102, § 143, as previously amended, to recover \$159 which the plaintiff had paid to one Leahy for fifty-three days' service as dog officer at the rate of \$3 a day. Writ in the First District Court of Bristol dated January 25, 1911.

On appeal to the Superior Court the case was submitted upon an agreed statement of facts to *Fox, J.*, sitting without a jury.

It was agreed that Leahy was appointed a dog officer of the plaintiff on July 26, 1910, and that he qualified as such dog officer on that day; that the plaintiff is a city of over twenty-five thousand inhabitants and pays its regular police officers a per diem wage in different amounts; that \$2.25 per day is paid to regular police officers for their first year in service, \$2.50 per day for their second year in service, \$2.75 per day for their third year in service, and that \$3 per day is paid to police officers who have been four years or more in service.

It further was agreed that the proper officials of the plaintiff approved the bill paid by the plaintiff to Leahy as dog officer; that during the first thirty-five days of the fifty-three days covered by the bill presented Leahy was employed temporarily as janitor in the Central Police Station of the plaintiff; that his name was on the pay roll in the police department during these thirty-five days and that he received the sum of \$2 per day for compensation as janitor while he acted in that capacity; that he was on the same pay roll as the rest of the police department, and that, while acting as janitor in the police station, it was his duty to drive the police wagon, if called out, during the period that the regular driver was allowed for his meals; that Leahy was never a regular police officer of the plaintiff; that he did police duty one day during this period by assignment of the chief of police and that on that day he made no charge as dog officer; that he was a constable for the plaintiff; that he reported for duty and made inquiries usually every day during the whole period from the chief of police as to complaints about dogs, and that he occasionally was excused from his duties as janitor by the chief of police to go out and kill unlicensed dogs; that he also, during the thirty-five days in question that he was acting as temporary janitor, devoted some time after his hours of employment at the police station to his duties as dog officer; that eighteen days of the time covered by the bill Leahy performed duties as such dog officer and that his name was not on any pay roll of the police department during such eighteen days; that he was not on those eighteen days under any regular pay, but was attending to his duties as dog officer exclusively. It also was agreed that Leahy before

his appointment in 1910 had served as dog officer for more than four years.

The defendant asked the judge to rule as follows:

1. Upon all the evidence the plaintiff cannot recover.
2. The plaintiff cannot recover anything for the thirty-five days when Leahy was under regular pay in the police department of the city of Taunton for which he received \$2 per day.
3. The plaintiff can in no event recover more than the minimum rate per day which it paid its regular police officers, namely, \$2.25.

The plaintiff also asked for certain rulings.

The judge found for the plaintiff; and assessed damages in the sum of \$58.42. He ordered that judgment should be entered in accordance with this finding. From the judgment so entered the defendant appealed.

The case was submitted on briefs.

F. S. Hall, for the defendant.

A. R. White, 2nd, for the plaintiff.

BRALEY, J. The St. of 1910, c. 629, having been approved June 15, 1910, did not take effect until thirty days thereafter. R. L. c. 8, § 1. But, the requirement that appointments under it must be made within ten days from July 1 of each year being directory, the action of the mayor on July 26, 1910, appointing Leahy as a constable to kill or cause to be killed unlicensed dogs was valid. If the statute were mandatory, as the defendant contends, no appointments for the current year would have been possible, and this result plainly was not intended by the Legislature. *Whitney v. Whitney*, 14 Mass. 88, 92, 93.

The defendant is required by the express provisions of the statute to reimburse the plaintiff for the amount paid Leahy during the period of eighteen days which he actually spent, but the compensation allowed cannot exceed the rate of daily wages received while in the performance of his ordinary duties as a police officer of the city. *O'Neill v. County of Worcester*, 210 Mass. 374. By reason of his rank as a regular officer he was entitled to the rate approved by the proper municipal officials, and the trial court properly charged the defendant with repayment of the disbursement.

Judgment affirmed.

COMMONWEALTH vs. GEORGE CLINE & others.

Suffolk. November 18, 1912. — January 3, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Attempt to commit Larceny. Pleading, Criminal, Indictment. Practice, Criminal, Bill of particulars, Sentence.

In an indictment for an attempt to commit larceny from the person of a person unknown by stealing property in his pocket, it is not necessary to describe the property attempted to be stolen or to allege its value, or to aver that the person unknown had anything in his pocket which could have been the subject of larceny.

Upon an indictment for an attempt to commit larceny from the person it is proper to deny a motion for a bill of particulars which asks only for a description of the property attempted to be stolen, this not being essential to the offense charged.

Numerous exceptions, which were designated by this court as without merit, relating to the admission of evidence at the trial of three defendants on an indictment for an attempt to commit larceny from the person of a person unknown by picking his pocket, here were disposed of briefly on principles fully established.

When R. L. c. 215, § 6, cl. 4, was in force, which provided that the punishment by imprisonment for an attempt to commit a crime should not exceed one half of the greatest punishment which might have been inflicted for the commission of the attempted crime, and when by R. L. c. 208, § 24, larceny from the person was punishable by imprisonment in the State prison for not more than five years or in jail for not more than two years, a sentence of eighteen months in the house of correction for an attempt to commit larceny from the person was authorized.

BRALEY, J. The second count of the indictment upon which the defendants were convicted is under R. L. c. 215, § 6, for an attempt to commit the crime of larceny from the person, where the person is alleged to have been to the jurors unknown. A bill of particulars was moved for and denied, and a motion to quash was overruled.*

These rulings were right. The offense is made out upon proof of a general intent to commit crime, and the doing of overt acts toward its accomplishment. It does not depend upon the amount which might have been stolen, nor is it necessary to describe the

* By Brown, J., before whom the defendants were tried.

property or to allege its value, or even to aver that the person unknown had anything in his pocket * which could have been the subject of larceny. *Commonwealth v. McDonald*, 5 Cush. 365. *Commonwealth v. Drohan*, 210 Mass. 445. The only specification requested was a description of the property, but this was unessential as the statutory offense had been fully, plainly and substantially set out, and nothing further was necessary to preserve the defendants' constitutional rights. R. L. c. 218, § 67. *Commonwealth v. Snell*, 189 Mass. 12, 18, 19. It moreover appears, that, the prosecutor not being in possession of the information desired, it could not have been furnished.

The numerous exceptions taken to the admission of evidence although urgently pressed are without merit. The evidence tended to show that the defendants,† and one Logan indicted with them but subsequently tried and acquitted, through a series of preconcerted devices and manœuvres in which each was to perform a designated part, followed the person to be robbed without exciting his suspicions and attempted to perpetrate the larceny while he was mingling with a crowd, thus affording them an opportunity for escape without danger of identification. The person charged in the indictment as unknown was on his way to board a street car, when the defendants acting as if they also intended to take the car impeded his progress, and as he stepped with other persons upon the car attempted to rifle his pockets. If two or more are acting in concert for the accomplishment of crime the acts of each are admissible against the others where there is evidence of a common purpose. The testimony implicating each and all cannot be introduced in bulk, but must be put in by piecemeal. The purpose for which the defendants were using the street car before passing to the street was a link in a chain of succeeding events, where the conduct of each defendant and of Logan was for the consideration of the jury under appropriate instructions. *Commonwealth v. Scott*, 123 Mass. 222. *Commonwealth v. Robinson*, 146 Mass. 571. *Commonwealth v. Meserve*, 154 Mass. 64. *Commonwealth v. Hunton*, 168 Mass. 130. The evidence of one Gordon MacKenzie, who testified to

* The count alleged that the property attempted to be stolen was in the pocket of the unknown person.

† Cline, Davis and Dixon.

having observed their movements on the car and in the street, of which he gave a full description, comes within these rules, while the admission of the leading question put by the assistant district attorney, to which the defendants excepted, was within the discretion of the trial judge. *York v. Pease*, 2 Gray, 282. The attempt to have this witness identify a hat pin for the purpose of corroborating him having failed, the inquiry was abandoned and the defendants were not harmed by evidence which had become immaterial. But, his veracity having been attacked in cross-examination, previous consistent statements were offered and admitted to corroborate him. It is unnecessary to decide whether, in view of the declination of the defendants' counsel to answer the question of the judge, whether he intended to argue to the jury that MacKenzie's evidence was of recent fabrication to meet the exigencies of the Commonwealth's case, the statements were admissible. The closing argument not having referred to the question, the jury were explicitly instructed to disregard this portion of the testimony. It must be presumed they followed the instructions, and the defendants have not been prejudiced. *Commonwealth v. Ham*, 150 Mass. 122. The conversation of one Conboy with the defendant Cline, and the evidence of one Trainor as to statements made by all of the defendants, while under arrest, were competent for reasons stated in *Commonwealth v. Spiropoulos*, 208 Mass. 71, 74. It is familiar law, that evidence of the avoidance of the defendants on the date set for their trial in the Municipal Court, as shown by the proceedings in that court, as well as by the witness Trainor, their flight from the Commonwealth, and subsequent apprehension, was admissible. *Commonwealth v. Annis*, 15 Gray, 197.

The exceptions taken at the close of the evidence remain to be considered. The second request, that "there is not sufficient evidence to warrant a verdict of guilty as to either of the defendants upon the second count" could not have been given. If the jury believed the evidence of the government the defendants Davis and Dixon put their hands in the pockets of the unknown man, while the defendant Cline could be found to have acted with them in furtherance of a common criminal purpose. *Commonwealth v. Clune*, 162 Mass. 206. *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 273. Nor is the exception to a part of the

closing argument of the assistant district attorney tenable. The course pursued by the judge is sanctioned by the decision in *Commonwealth v. Poisson*, 157 Mass. 510, 513.

The defendants further contend, that the sentence imposed of eighteen months at hard labor in the house of correction exceeded the jurisdiction of the court. By the R. L. c. 215, § 6, cl. 4, in force when the offense was committed, but repealed by St. 1911, c. 130, punishment for an attempt to commit a crime cannot exceed one half of the maximum penalty which may be imposed for the crime itself, and by R. L. c. 208, § 24, "Whoever commits larceny by stealing from the person of another shall be punished by imprisonment in the State prison for not more than five years, or in jail for not more than two years." In *Commonwealth v. O'Neil*, 188 Mass. 330, these sections were construed as authorizing a sentence of two and one half years in the house of correction. It is argued, however, that under R. L. c. 208, § 30, the municipal court having concurrent jurisdiction could not have sentenced for a longer term than three months, and the Legislature could not have intended that the same offense should be punished more severely by one court than by the other. *Commonwealth v. Gately*, 203 Mass. 598. But R. L. c. 208, § 30, repealed by the St. of 1911, c. 126, was in effect amended by the St. of 1909, c. 442, which conferred upon the Municipal Court jurisdiction to impose for the offense of which the defendants have been convicted the same sentence as the Superior Court has awarded. R. L. c. 208, § 26. *Commonwealth v. Drohan*, 210 Mass. 445, 448. We have considered all of the exceptions and, finding no error of law, the judgment from which an appeal has been taken is affirmed, and the exceptions are overruled.

So ordered.

C. W. Rowley, for the defendants.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

DANIEL GAINES vs. E. A. PEABODY & another.

Essex. November 8, 1911, November 6, 1912. — January 4, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON,
& DECOURCY, JJ.*Negligence, Employer's liability.*

A mason's tender in the employ of a contractor for the mason, terra cotta and stone work of a building in process of construction, which is not an iron or steel framed building within the meaning of R. L. c. 104, § 44, assumes the risk of injury from falling through an opening in the plank flooring of the building which existed and was obvious at the beginning of his contract of employment three days before the accident and which at the time of the accident has been made less obvious by the temporary piling of terra cotta nearer to it and higher about it.

TORT by a mason's tender for personal injuries sustained on October 6, 1904, while in the employ of the defendants, who had a sub-contract to do mason, terra cotta and stone work in a building in process of construction in Lawrence, by falling into the basement of the building through an opening in the first or street floor. Writ dated October 5, 1905.

In the Superior Court the case was tried before *Bell, J.* The building was two hundred feet long and seventy-five feet wide. At the time of the accident the walls were up to about the seventh story, and the first rough flooring had been laid on all of the seven floors. The stairway, elevator and other openings, about four or five on each floor, were open and were not guarded or covered. The hole through which the plaintiff fell was used to take up brick, but had not been in use for a month. The plaintiff testified that he had been a hod carrier for over twenty years and that he went to work for the defendants on October 4, 1904; that on that day and on the succeeding day he was at work in the basement of the building and had no occasion to go and did not go to the street floor or to any other floor of the building; that on October 6 he was ordered to go to work on the seventh floor; that in going there he went from the ground to the second or third floor by an outside ladder and then went to the seventh floor by a series of inside ladders; that in going to dinner at

noon and in returning to work after dinner he followed the same route; that at five o'clock on the afternoon of that day he had quit work and followed the other men who had been working with him down the series of ladders leading from floor to floor; that from the second story to the first or street floor the men went down an inside ladder and he followed them; that it was dark on the street floor on account of the setting of the sun and of the obstructions on the outside of the building and around the hole; that he followed close after the man in front of him for fear that he should fall into a hole or other place; and that he was about ten feet away from the man in front of him when he fell into the hole and was injured. The facts shown by the evidence in regard to the character of the hole and the condition of its surroundings at the time of the accident are stated in the opinion.

The judge refused to order a verdict for the defendant. He "instructed the jury that the plaintiff was not entitled to recover by reason of the unguarded or uncovered condition of this opening in the floor through which he fell, and further instructed them that in order to recover the plaintiff must prove that there had been such change in the condition of the terra cotta surrounding this opening from October 4, the date when he went to work, to October 6, the date when he was injured, as to render it more dangerous, and they must further find that this accident was caused by this change in the condition of the terra cotta."

The jury returned a verdict for the plaintiff in the sum of \$1,500, and by agreement of the parties the judge reported the case for determination by this court. If the case should have been submitted to the jury, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the defendants.

The report having been discharged by an order of this court for any amendment which the judge might think necessary bearing upon the question whether the building in the course of construction in which the plaintiff was injured was a steel framed building within the meaning of R. L. c. 104, § 44, the judge, after a hearing, made a supplemental report in which he stated that the question whether the building was a steel framed building was not raised at the trial before him and was not passed upon by the jury. The supplemental report was presented to this court with further argument on November 6, 1912.

The case first was argued at the bar in November, 1911, and again in November, 1912, before *Rugg, C. J., Hammond, Braley, Sheldon, & De Courcy, JJ.*, and afterwards was submitted on briefs to all the justices.

W. Coulson, for the plaintiff.

J. G. Walsh, for the defendants.

RUGG, C. J. The plaintiff was a mason's tender in the employ of the defendants, of many years' experience. He was engaged to work upon a building in process of construction. By the record as amended it is apparent that it is not now open to the plaintiff to argue that the building was an iron or steel framed building. Hence the provisions of R. L. c. 104, § 44, do not apply. The law applicable to the relation of the parties under these circumstances is as stated by Knowlton, J., in *Murphy v. Greeley*, 146 Mass. 196, at 200: "The defendant was under no obligation to provide against the ordinary risks incident to the performance of the contract which" the plaintiff "entered into, nor against any special risks incident to the peculiar manner in which he might perform it." The plaintiff seeks to distinguish the case at bar from this principle by reason of its facts. These are in substance that he had been at work upon the building three days, and was injured by stepping off a plank which spanned an opening on the first floor, as he was leaving the building in company with other laborers. The opening had been made by the defendants, and had been used for hoisting materials, but not for a month before the accident. The place was somewhat dark, partly by reason of its location in the building, but chiefly by reason of the piling of terra cotta close to the hole, so that it was not possible to go around it. The amount and location of the terra cotta changed from day to day, as it was used in the construction of the building, and fresh supplies were brought in. There was evidence tending to show that the place was darker, by reason of more terra cotta about the hole, than it was at the time of the employment of the plaintiff. The mere existence of a hole in the floor of a building in process of construction is in itself no evidence of negligence. It is one of the conditions which, apart from statutory obligation to guard, must be anticipated by anybody working there. *Beique v. Hosmer*, 169 Mass. 541. *Morris v. Walworth Manuf. Co.* 181 Mass. 326. *Eisner v. Horton*, 200 Mass.

507. *Johnson v. H. P. Cummings Construction Co.* 201 Mass. 477. Moreover, the hole was the same in size and position as when the plaintiff entered upon his contract of employment. It was open and obvious, and the risk from it must be held to have been assumed. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412. *Crimmins v. Booth*, 202 Mass. 17. *Butler v. Frazee*, 211 U. S. 459. The piling of the terra cotta, constantly varying in amount and position with the progress of the construction of the building, was a transitory risk, as to which no duty rested upon the defendants. Hence the circumstance that the place was darker than when the plaintiff entered the employment, by reason of piling the terra cotta nearer to the hole or higher about it, is immaterial. This danger was transitory. *McCann v. Kennedy*, 167 Mass. 23. *Kanz v. Page*, 168 Mass. 217. *Murdock v. Paine Furniture Co.* 211 Mass. 97. *Flynn v. Campbell*, 160 Mass. 128. *Whittaker v. Bent*, 167 Mass. 588.

The case is close to the line, but a majority of the court are of opinion that the record does not disclose any breach of any duty owed by the defendants to the plaintiff. In accordance with the terms of the report, judgment is to be entered for the defendants.

So ordered.

COMMONWEALTH vs. JAMES H. HORSFALL.

Middlesex. November 18, 1912. — January 4, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Automobile. Practice, Criminal, Conduct of trial, Verdict, New trial. Words, "Knowingly."

At the trial of an indictment under St. 1909, c. 534, § 22, for operating an automobile recklessly, where it appears that, when the defendant was operating a forty-eight horse power touring car upon a State road with ample room to pass another automobile which was standing at the side of the road, he ran into and injured that automobile and also struck and injured a woman who was near it, it is right for the presiding judge to refuse to rule that, if after it first was possible for the defendant to see the woman he did everything that was possible to avert the accident, he could not be found guilty; because the defendant's driving before that moment might have been reckless and in disregard of the rights of other travellers whether they were in sight or not.

At the trial of an indictment under St. 1909, c. 534, § 22, for operating an automobile recklessly, a statement in the charge of the judge to the effect that automobiles must be used very much as other vehicles must be used and that the driver's duty is to look out for persons and other vehicles on the highway is correct; and an instruction, that the care which the driver of an automobile must exercise "is proportionate to that instrumentality or engine which he has in charge," even if not expressed with precise technical accuracy, is correct in substance.

At the trial of a criminal case, as in a civil one, the presiding judge under R. L. c. 173, § 80, has a right to "state the testimony" and may read to the jury his notes of the testimony of one of the witnesses.

Upon an indictment under St. 1909, c. 534, § 22, against the driver of an automobile for knowingly going away without stopping and making himself known after causing injuries to person and to property, the defendant cannot be said "knowingly" to have failed to perform the requirements of the statute if after causing the injuries he sent back from the place where his automobile stood disabled by the collision a messenger with instructions to tell his name and residence and supposed that the messenger had done this, although in fact he had not.

At the trial of an indictment under St. 1909, c. 534, § 22, which contained a first count charging the defendant with operating an automobile recklessly and other counts charging the defendant with knowingly, while operating an automobile, going away without stopping and making himself known after causing injuries to person and to property, there was no error in the rulings of the judge in regard to the first count but his charge contained erroneous instructions in regard to the other counts mentioned. The jury found the defendant guilty both on the first count and on the other counts mentioned. In sustaining the defendant's exceptions to the erroneous instructions, *it was ordered*, that the new trial should be confined to the counts to which the erroneous instructions related and that the verdict of guilty upon the first count should stand.

INDICTMENT, found and returned on January 5, 1912, for alleged violation of the provisions of St. 1909, c. 534, § 22, with four counts.

The first count charged the defendant with operating an automobile recklessly at Wilmington on November 11, 1911; the second count charged him with operating an automobile at the same time and place while under the influence of intoxicating liquor; the third count charged that the defendant on the same day "while operating an automobile on a way in Wilmington did knowingly go away without stopping and making himself known after causing injury to the person of Ruth Kittredge;" and the fourth count charged that the defendant on the same day "while operating an automobile on a way in Wilmington did knowingly go away without stopping and making himself known after causing injury to the property of Albert H. Zepp."

At the trial in the Superior Court before *McLaughlin, J.*, the facts appeared in evidence which are stated in the opinion. The defendant's automobile, besides striking the aged woman there mentioned, also struck and injured the stationary automobile near which she was standing.

At the close of the evidence the defendant asked the judge to give to the jury the following instructions:

"1. If the defendant had no reason to believe that a woman was standing at the point where this woman was struck and if, after it was first possible for him, under existing conditions, to see the woman, he did everything that was possible to avert the accident, then your verdict should be not guilty upon the first count of this indictment.

"2. The driver of an automobile is not bound, in the operation of his car, to anticipate and guard against unusual dangers, the existence of which he has no reasonable grounds to anticipate, and he is bound only to use the utmost care after he has become aware of them to prevent an accident."

The judge refused to give these instructions, and instructed the jury in regard to the reckless operation of an automobile as stated in the opinion. The defendant excepted to the refusal of the instructions requested by him and to certain portions of the judge's charge which are described sufficiently in the opinion.

The jury found the defendant guilty on the first, third and fourth counts and not guilty on the second count. The defendant alleged exceptions.

J. F. Cavanagh, (M. F. Connelly with him,) for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

RUGG, C. J. This indictment charges in separate counts that the defendant (*inter alia*), in violation of St. 1909, c. 534, § 22, upon a public way, operated an automobile "recklessly" and "knowingly" went "away without stopping and making himself known after causing injury" to person and to property.

The undisputed facts were that the defendant, while driving a forty-eight horse power automobile of the touring car type upon a State road, struck an aged woman standing near a stationary automobile, inflicting injuries from which she died. The stationary automobile upon the side of the way was observed by the defendant some distance before he reached it, and the horns

of both automobiles were sounded before the accident. There was ample room to pass.

1. The defendant's first two requests for instructions as to reckless operation of the automobile were denied rightly. The crime charged was that the defendant operated an automobile recklessly. Instructions as to the meaning of these words were given, to which no exception was taken. As bearing upon this crime the defendant's conduct after he saw the woman was by no means decisive, for his driving previous to that moment may have been such as to ignore the rights of other travellers, even if he did not see them. Antecedent conduct may be found to be reckless, even though all possible care may be exercised after the specific danger is actually discovered. Indeed, a person might be guilty of reckless driving although no one was upon the street. *Mayhew v. Sutton*, 20 Cox C. C. 146. *Lawrence v. Fitchburg & Leominster Street Railway*, 201 Mass. 489, 492, has no bearing upon the facts disclosed here.

2. The statement in the charge to the effect that automobiles must be used very much as other vehicles must be used and that the driver's duty is to look out for persons and other vehicles on the highway was not open to exception.

3. The instruction was correct that the care, which the driver of an automobile "must exercise, is proportionate to that instrumentality or engine which he has in charge." Speaking with precise technicality, every traveller upon a highway is bound to exercise the care of the ordinarily prudent and cautious person under all circumstances. The degree of vigilance and continuity of alertness necessary to attain that standard vary with the time and place, surroundings and means of transportation. But it would savor too much of refinement to hold that there is any practical inaccuracy in saying that one driving a high-powered automobile must exercise greater care toward others on a State highway than one plodding along a country road with an ox team. The charge upon this point was full and without error. *Keith v. Worcester & Blackstone Valley Street Railway*, 196 Mass. 478, and cases cited. *Brown v. Thayer*, 212 Mass. 392, 396. *Sullivan v. Scripture*, 3 Allen, 564.

4. There is nothing in the exception to the reading to the jury by the judge from his notes of the testimony of one of the wit-

nesses. He had a right to "state the testimony." R. L. c. 173, § 80.

5. Upon the counts which charged that the defendant "did knowingly go away without stopping and making himself known after causing the injury" to person and to property, there was evidence tending to show that the defendant while waiting for a considerable time at his own automobile which was disabled by the accident sent a man named Brooks back to the place, where the woman was injured and where the other automobile remained, with instructions to disclose his identity, and that Brooks although going to the place did not tell who the defendant was. Upon this aspect of the case the jury were instructed, in substance, that, even though the defendant told Brooks to go back and tell his name and residence and relied on him to do it and supposed he had done it, yet if Brooks failed to do as requested then the defendant had not complied with the statute.

The question is as to the meaning of the statute. Its obvious purpose is to enable those in any way injured by the operation of an automobile upon a public way to obtain forthwith accurate information as to the person in charge of the automobile. It should be interpreted in such way as to effectuate this end. Manifestly it imposes active and positive duties upon the operator of the automobile. It is not satisfied by stopping at some remote, obscure or inaccessible place, nor by a mere passive willingness to answer inquiries. In unmistakable language it requires the tendering on the spot and immediately of explicit and definite information as to himself of a nature which will identify him readily, and make it simple and easy to find him thereafter. While the statute does not state in terms to whom this information shall be given, its plain implication is that it must be furnished to those whose person or property has been injured, if reasonably possible, and if not to some one in their interest or to some public officer or other person at or near the place and time of injury. But the inhibited conduct consists in "knowingly" going away without giving this information. There are many statutes which prohibit the performance of a certain act without regard to the intent of the actor or his knowledge that elements are present which constitute a crime. *Commonwealth v. Mixer*, 207 Mass. 141, and cases there collected. It would have been simple for the Legis-

lature to have made the act of going away by the driver of an automobile without making himself known after injuring person or property a crime, and this would have been accomplished by omitting the word "knowingly" from the statute. The insertion of this word cannot be treated as immaterial. It is a principle of statutory construction that all words found in the act shall be given effect, if possible. "Knowingly" is a word frequently inserted in statutes creating crimes. In such connection, it commonly imports a perception of the facts requisite to make up the crime. For one who operates an automobile "knowingly" to go away without making himself known requires a consciousness not only of the fact that he is going away, but of the further fact that he has not made himself known. If in truth he has delegated the duty of revealing his identity to an agent, and honestly and with good reason supposes that this delegated duty has been performed, he cannot be said "knowingly" to have failed to do what the statute requires, even if the agent did not discharge his duty. If the transaction was genuine throughout, the driver of the automobile may thoroughly, though mistakenly, believe that the requirement of the law has been observed. The charge of the judge did not state accurately the law upon this branch of the case, and hence this exception must be sustained.

No error is disclosed as to the trial upon the first count of the indictment. The verdict of guilty upon that count is to stand. The exception which is sustained relates only to the third and fourth counts, and the new trial must be confined to those counts.

So ordered.

COMMONWEALTH vs. FANNIE BALDWIN.

Suffolk. November 18, 1912. — January 4, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Nuisance. Autrefois Acquit.

At the trial in the Superior Court of an appeal from a conviction by a municipal court on a complaint under R. L. c. 101, §§ 6, 7, for maintaining a common nuisance during a certain period by the maintenance of a tenement resorted to for prostitution and lewdness, it is no bar to the complaint that the defendant was acquitted in the municipal court on another complaint on which he was tried there at the same time charging him with maintaining a common nuisance during the same period by the maintenance of a tenement used for the illegal sale of intoxicating liquor.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on August 7, 1911, under R. L. c. 101, §§ 6, 7, charging the defendant with maintaining a common nuisance, to wit, a tenement resorted to for prostitution and lewdness.

The defendant, having been convicted in the municipal court, appealed to the Superior Court and filed in that court a plea in bar, setting forth the facts which are stated in the opinion in regard to the acquittal of the defendant on another complaint, on which the defendant was tried in the municipal court at the same time, and which charged the defendant with maintaining a common nuisance during the same period by maintaining a tenement used for the illegal sale of intoxicating liquor. The Commonwealth demurred to the plea.

The case was heard on the demurrer by *Chase, J.*, who sustained the demurrer and ordered the defendant to plead to the complaint. The defendant then pleaded not guilty, and was tried and convicted. The defendant appealed from the order sustaining the demurrer, and also alleged exceptions to the order.

J. P. Feeney, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. The demurrer to the plea in bar was rightly sustained. Both complaints were made and sworn to by the same

person at the same time. In each the crime charged was the keeping and maintaining of a common nuisance between March 7, 1911, and August 7, 1911. One complaint alleged that the tenement was used for the sale of intoxicating liquor; the other that it was resorted to for prostitution and lewdness. Both complaints were tried together in the lower court "at one trial." That court found the defendant not guilty on the first and guilty on the second.

The only sensible view of the course taken by the lower court is that the Commonwealth proved that the tenement was resorted to for prostitution and lewdness and was therefore a nuisance, but failed to show that it was used for the sale of intoxicating liquor, and that the acquittal was based upon a variance between the charge and the proof.

It is well settled that where there are two or more counts, even for the same offense, in one complaint or indictment, an acquittal on one count by reason of a variance is perfectly consistent with conviction upon another stating the offense in a different way. *Commonwealth v. Edds*, 14 Gray, 406. Under the peculiar circumstances of this case the same rule should be applied here; and the failure to prove the specific allegation in one complaint and the consequent acquittal by reason of a variance between the charge and the proof is no bar to conviction upon the other.

Exceptions overruled; order sustaining the demurrer affirmed.



EDWARD W. CURTISS *vs.* INHABITANTS OF SHEFFIELD & another.
SAME *vs.* SAME.

Berkshire. October 3, 1912. — January 6, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Tax, Lien, Assessment. Joint Tenants and Tenants in Common. Equity Jurisdiction, To set aside tax deed. Equity Pleading and Practice, Decree.

Review by HAMMOND, J., of legislation in the Province and the Commonwealth in regard to tax liens.

Where land is owned by tenants in common the assessment of a tax upon the undivided interest of one of the tenants in common is invalid.

In a suit in equity by a tenant in common of certain land to set aside a tax deed of the land on the ground that the taxes, for the non-payment of which the land was sold, were invalid because they were assessed severally upon the undivided interests of the tenants in common, where it appeared that this erroneous method of assessment was adopted at the request of the plaintiff and his cotenants and that after the error was discovered the land was reassessed properly, it was *held*, that, if the plaintiff within a time named should pay the taxes thus properly reassessed, the tax deed should be declared void; otherwise, that the bill should be dismissed.

TWO BILLS IN EQUITY, filed on June 27, 1910, to set aside tax deeds of two parcels of land in Sheffield in which the plaintiff owned an undivided seven ninths interest, alleging that such deeds were void by reason of the invalidity of the assessment of the taxes for the years 1904 and 1905, for the non-payment of which the tax sales were made.

The cases were referred to Sanborn Gove Tenney, Esquire, as master, and afterwards were heard on the plaintiff's exceptions to the master's report by *Irwin*, J., who in each of the cases made a decree overruling the exceptions to the master's report and ordering that the bill be dismissed. The plaintiff appealed.

The cases were submitted on briefs.

E. W. Curtiss, pro se.

H. M. Whiting, for the defendants.

HAMMOND, J. The general findings of the master that none of the taxes have been paid and that no tender of the amounts due has been made are justified by the subsidiary findings set out in the report, and must stand. So far therefore as the plaintiff relies upon payment or tender he fails.

He contends, however, that the deeds are void by reason of irregularities in the proceedings of assessment and sale; and in support of this contention he alleges that the assessments made upon the two lots named in the bill in the first case were illegal because, the lots being owned by tenants in common, the tenants were assessed each for his own individual interest therein, whereas, as the plaintiff says, they should have been jointly assessed for the whole.

We will first consider this objection so far as respects the taxes for the year 1905. It appears that on May 1 of that year the first of these two lots was owned by the plaintiff and his two children as tenants in common, he owning seven ninths and his children

each one ninth. This lot was known on the assessors' books as the "milling property" and consisted of about one acre of land with the buildings thereon, the whole being valued by the assessors at \$3,750. It was originally assessed two thirds to the plaintiff and one third to each of the children, but, the assessors apparently having discovered the error as to fractions, a reassessment was made changing the figures so as to conform to the actual state of the title. Upon the books of the assessors the entries were made in the following way:

"Curtiss, Edward W. 7/9 [Description of the property] — \$2916. Tax \$47.53.

"Curtiss, Irving M. 1/9 [Description of the property] — \$417. Tax \$6.79.

"Carson, Mrs. Margaret. 1/9 [Description of the property] — \$417. Tax \$6.79."

It thus appears that the assessment was not of the whole tax upon the whole land to the tenants jointly, but an assessment to each tenant upon his undivided interest in the land for his proportionate part of the tax upon the whole land. The case seems to raise the general question whether an assessment to a tenant in common for his undivided interest in land is authorized under our system of taxation. There can be no doubt that it is within the power of the Legislature to authorize such an assessment. The only question is whether it has done so. It is merely a question of statutory construction, but, nevertheless, is one of considerable difficulty.

Not much light is thrown upon it by those portions of the colonial and provincial statutes which directly prescribe the manner of assessment. They provide in general terms that each inhabitant shall be assessed in just proportion according to his estate both real and personal, and that the amount of his tax shall be clearly set forth, but with reference to the question under discussion the language is vague and indefinite. See, for example, Anc. Chart. 69, 249, and the several provincial annual tax acts of which Prov. St. 1738-39, c. 13, 2 Prov. Laws, (State ed.) 952, is a fair sample. Perhaps the most that can be said of the provisions contained in these statutes as to the manner in which the assessments shall be made and recorded is that they are not conclusive either way on the question. And, speaking

generally, it may be said that none of our statutes, past or present, whether colonial, provincial or State, contains any direct provision as to the manner of assessing real estate owned in fee by tenants in common. None expressly directs either that the assessment shall be made to the tenants each for his own undivided interest, or to the tenants jointly for the whole. And while some of the provisions seem to point to the first, others seem to point to the second, as the proper method; and taken as a whole they are not absolutely inconsistent with either view. Hence if the decision of this question depended entirely upon these provisions as to the manner of assessment, it would be difficult to say that an assessment to a tenant in common upon his undivided interest is unauthorized.

But these provisions for the making and recording of assessments do not constitute the whole of our system of taxation. There are also provisions for the collection of the taxes. And these two sets of provisions, the one for assessing and the other for collecting, constitute the whole system, each set being essential. By comparing these two and studying them in their relation to each other and to the whole system, doubts as to the meaning of the one may be resolved by the plain legal meaning of the other. Where practicable, each set should be so interpreted as not to clash with the efficient action of the other, to the end that there may be harmony in the working of the whole and that taxes may be not only assessed but also collected.

In this Commonwealth there never has been a lien upon any article of personal property for the tax assessed therefor, no matter how large or cumbersome the article might be. The only method of collecting a tax upon personalty is by distress, arrest or action at law. It is otherwise as to a tax on real estate. In addition to these three remedies there is a process *in rem* for the collection of such a tax. A tax upon real estate may be assessed to the owner or occupant, and even when assessed to the latter it is a lien upon the whole land irrespective of the various interests of the owners or of lienors of any kind; and this lien may be enforced by a taking or sale. R. L. c. 13, §§ 35 *et seq.*

It becomes necessary to examine into the history of the legislation as to tax liens. The Prov. St. 1731-32, c. 9; 2 Prov. Laws, (State ed.) 616, seems to have been the earliest statute giving a

lien for taxes upon real estate. It was applicable only to unimproved lands of non-residents. It provided that if the tax was not paid three freeholders, to be appointed by the assessors, should "apprize so much of such . . . lands . . . as they judge will be sufficient to pay and satisfy" the taxes and charges, and that, the default continuing, the part thus apprized should be sold, and a deed thereof be given to the highest bidder. If the part apprized sold for more than enough to discharge the tax and charges, the surplus was to be paid to the "delinquent proprietors." See also Prov. St. 1735-36, c. 6, § 1, 2 Prov. Laws, (State ed.) 759, where only "so much and no more" of the land as the assessors should judge sufficient to pay the tax and charges should be offered for sale. See also to the same effect Prov. Sts. 1745-46, c. 9, § 1, 3 Prov. Laws, (State ed.) 251; 1752-53, c. 17, 3 Prov. Laws, (State ed.) 646; 1761-62, c. 44, § 1, 4 Prov. Laws, (State ed.) 532; 1777-78, c. 13, § 5, 5 Prov. Laws, (State ed.) 757. In this last statute the language is that the collector shall "sell so much only" of the land "as will be sufficient to discharge" the tax and charges. And the same language is employed in the following statutes, namely: Prov. Sts. 1777-78, c. 26, § 4, 5 Prov. Laws, (State ed.) 793; 1779-80, c. 12, § 5, 5 Prov. Laws, (State ed.) 1111; 1779-80, c. 30, § 5, 5 Prov. Laws, (State ed.) 1164; 1779-80, c. 49, § 5, 5 Prov. Laws, (State ed.) 1228; 1780, c. 9, § 6, 5 Prov. Laws, (State ed.) 1407, 1408; 1780, c. 16, § 5, 5 Prov. Laws, (State ed.) 1431; and St. 1785, c. 70, § 7.

St. 1785, c. 70, § 6, extended the lien to the case where the landowner removed out of town after the tax was assessed. In such a case the collector was to sell "so much of the said land" as would suffice to pay the tax and charges. In § 7 the lien was extended to embrace the case of improved land of persons living out of the State, the lien to be enforced in the same manner. In this last class of cases, namely, where the landowner lived out of the State, it was early held that the tax was a lien on the land only and was not a personal charge. *Rising v. Granger*, 1 Mass. 47.

There were no other provisions for a lien for taxes upon real estate until the annual tax act of 1822, usually cited as St. 1821, c. 107. This applied only to taxes on real estate situated in Boston, and provided that if the tax was not paid the collector should sell "so much of the same" as should be necessary to discharge the

tax and charges. The same provision was continued in the following year by St. 1822, c. 108, § 9 (February 11, 1823), and by St. 1823, c. 133, § 9 (February 21, 1824), the lien was made general throughout the Commonwealth, and with modifications not here material the lien has ever since existed. St. 1830, c. 151, § 8 (February 28, 1831). Rev. Sts. c. 8, § 18. Gen. Sts. c. 12, §§ 22, 23. Pub. Sts. c. 12, §§ 24, 25. R. L. c. 13, § 35. St. 1909, c. 490, Part II, § 36.

At the time these various liens were established and until the Revised Statutes went into effect, the only way of enforcement was by a sale of so much of the land as was considered sufficient to discharge the tax and charges. It is manifest that by the term "land" as used in this connection is meant the actual physical object, and not an undivided interest therein. Accordingly it was held in *Wall v. Wall*, 124 Mass. 65, that the collector could not sell an undivided portion "so as to constitute the purchaser a tenant in common with the owner."

It is familiar law that a conveyance whether in fee, in mortgage or by lease, by a tenant in common of his undivided interest in a specific part of the land held in common is invalid as against his cotenants without their consent. See *Peabody v. Minot*, 24 Pick. 329, and *Marks v. Sewall*, 120 Mass. 174, and cases cited. And a levy of execution upon the undivided interest of a tenant in common in a specific part of the land is invalid. *Blossom v. Brightman*, 21 Pick. 283.

The tax lien must be commensurate with the tax; it covers the thing for which the tax is assessed and it covers nothing else. In the case of land owned by tenants in common, if the tax for the whole is assessed to the tenants jointly then the lien is entire for the whole tax and covers the whole land; if each owner is assessed only upon his undivided interest then the lien, if it exists at all, is not upon the whole land but only upon that undivided interest, and there are as many liens as there are tenants in common, each lien being complete in itself and independent of the others.

At the time the act establishing a lien for all taxes upon real estate was passed (St. 1823, c. 133), the provisions for the enforcement of the lien were inapplicable in the case of a tax upon an undivided interest in the land. The law above stated as to the levy of an execution upon the interest of a tenant in common in

a specific part of the land held in common was applicable to the enforcement of a lien for taxes. In neither case could such an interest be taken or sold. Only where the tax upon the whole land was assessed to the tenants jointly could the lien be enforced.

Taxes are essential to the efficient action of government, nay, even to its existence, and the provisions enacted for their collection should be so construed as to reach the end desired and not to furnish to the taxpayer any easy way of evasion or escape, to the end not only that taxes may be assessed, but, what is more important, that they may be collected.

Tenancy in common is not unusual. It is not to be presumed that the law making power, when it established this lien for all taxes upon real estate, supposed or intended that the lien should not extend to land so held, or that there were two methods of assessing taxes upon the owners of such land, the one resulting in an enforceable lien, the other in one non-enforceable. Rather is it to be presumed that the only system of assessment authorized was such as always to result in an enforceable lien. Such an interpretation of the provisions for assessment creates harmony in the whole system of taxation and results in an enforceable lien in all cases; while any other interpretation would create discord and would result in a non-enforceable lien in many cases. We are therefore of opinion that at the time of the establishment of the lien for all taxes upon real estate there was no authority for the assessment of taxes upon the undivided interest of a tenant in common.

And although several changes have been since made in the method of enforcing the lien (see Rev. Sts. c. 8, §§ 28, 29; Gen. Sts. c. 12, § 33; Pub. Sts. c. 12, § 35; St. 1900, c. 376; R. L. c. 13, §§ 41, 53 *et seq.*; St. 1909, c. 490, Part II, §§ 42 *et seq.*), there is nothing in them indicating a change in the nature or scope of the lien. Nor has there been any change in the method of assessment leading to any different result. R. L. c. 13, § 56, simply authorizes the assessment of the whole tax on land owned by tenants in common to one of the tenants, and when so assessed, the lien as a whole is enforced upon the whole land. It has no application where the tenant in common is assessed only for his undivided interest. The law with respect to the question under discussion continues as before. A tax to a tenant in common for only his undivided interest is invalid. See in this connection *Howard v.*

Proctor, 7 Gray, 128, 132; also, for a sketch of the legislation as to tax liens, the opinion of Holmes, J., in *Richardson v. Boston*, 148 Mass. 508. For decisions based upon the statutes of other States, some one way and some the other, see *Ronkendorff v. Taylor's lessee*, 4 Pet. 349; *Payne v. Danley*, 18 Ark. 441; *Hubbard v. Winsor*, 15 Mich. 146; *Russell v. Lang*, 50 La. Ann. 36; *State v. Rand*, 39 Minn. 502; *Corbin v. Inslee*, 24 Kans. 154, and the cases cited in 37 Cyc. 1006, note 5.

It appears in the present case that although the tax was expressly assessed to the tenants in common, each his proportionate share thereof and upon his own undivided interest in the land, yet the proceedings for the enforcement of the lien went upon the theory that the lien was entire upon the whole land, as though the whole tax had been assessed to the tenants jointly. The amount of the tax stated in the advertisement and also in the deed as due and unpaid was \$68.11, which is the exact total of the sums separately assessed, and the proceedings were as if the lien was entire for that sum total upon the whole. In a word the proceedings were conducted as they would have been if the tax had been correctly assessed.

In view of these facts it is contended by the defendants that the only inaccuracy in the whole proceedings from beginning to end was in the method of assessment, and that as that occurred at the request of the plaintiff and his cotenants he ought not to be allowed to avail himself of it to avoid the payment of taxes justly due from him. It might be that this rule would be applicable in proceedings by way of distress, arrest or action at law against either tenant to collect of him only the tax assessed to him (*Burr v. Wilcox*, 13 Allen, 269), but neither tenant even then could be held for the tax assessed upon his cotenants. And in the same way the remedy by lien is no broader than the tax assessed. The tax being upon a part the lien cannot be upon the whole. In the present case it is not strictly accurate to say that the only trouble is with the assessment. There is another trouble arising later, resulting, it is true, in some respects from the first, but entirely distinct from it, namely, the lack of commensuration between the undivided interest for which the tax was assessed and the whole land upon which the collector has attempted to enforce the lien. The principle invoked is not applicable.

It follows that the deed of the lot in question, for the non-pay-

ment of the taxes of 1905, is invalid. For the same reason all the deeds of the lots named in the first bill for non-payment of taxes of 1904 or 1905 are invalid.

It is unnecessary to consider in detail the plaintiff's exceptions to the master's report. Some of them are immaterial. Some ask for findings of facts upon evidence the whole of which is not before us. As to the rest it is sufficient to say that so far as they are consistent with this opinion they are sustained, and so far as inconsistent with it they are overruled.

The plaintiff is entitled in the first case to equitable relief upon certain conditions. He who seeks equity must do equity. The error occurred at the special request of the plaintiff and his cotenants. The taxes have not been paid. They have been properly reassessed, and so far as appears by this record are a lien upon the land. Under these circumstances the decree should be that if within thirty days from the entry of the rescript the plaintiff pays the taxes for the years 1904 and 1905 as reassessed in 1909, with interest thereon from the time of such reassessment, then the deeds shall be declared null and void; otherwise that the bill shall be dismissed. Neither party to have costs in any event. And it is

So ordered.

In the second case there appears to be no trouble, at least with the deed of Benjamin, collector for the year 1905. The plaintiff shows no ground for relief in equity. The decree should be: Bill dismissed with costs.

So ordered.

WALTER A. TAYLOR & another vs. PIERCE BROTHERS, Limited.

Bristol. October 28, 29, 1912. — January 7, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DE COURCY, JJ.

Negligence, Employer's liability. *Evidence*, Presumptions and burden of proof.

In an action against the proprietor of a cotton mill for causing the instant death of a back boy in its employ, whose duty it was to bring roving for the mules from the card room on the floor below, going there by a stairway, it appeared

that in some unexplained manner the boy was struck and killed by the counterweight of an elevator that in ascending passed through trap doors in the different floors. No one had seen the boy from the time he started in the direction of the elevator until his lifeless body was found with the head partially in a hole in the mule room floor made for the passage of the counterweight and with the counterweight resting upon the side of the face. The plaintiff contended that it could have been found that, when the boy was looking through the hole in the floor to ascertain whether there was any roving in the card room before going for it, the elevator was set in motion and ascended, opening the trap doors, by one of which the boy was caught and held while the counterweight came down and killed him. *Held*, that, the conduct of the boy before and during the opening of the trap doors being a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident and consequently that the action could not be maintained.

TORT under St. 1909, c. 514, § 129, by the father and mother of Robert A. Taylor, as his next of kin who were dependent upon his wages for support, for causing his instant death on August 16, 1910, when he was employed as a back boy in the cotton mill of the defendant at New Bedford. Writ dated November 19, 1910.

In the Superior Court the case was tried before *Lawton*, J. The contention of the plaintiffs in regard to the happening of the accident and the character of the evidence are described in the opinion. At the close of the evidence the defendant asked for certain rulings, of which the first was that upon the whole evidence the plaintiff could not recover. The judge refused to make this first ruling requested by the defendant and submitted the case to the jury, who returned a verdict for the plaintiffs in the sum of \$2,000. The defendant alleged exceptions, relying upon its exception to the refusal of the judge to make such first ruling.

A. J. Jennings, (*I. Brayton* with him,) for the defendant.

J. W. Cummings, (*C. R. Cummings & J. W. Nugent* with him,) for the plaintiffs.

BRALEY, J. The defendant, having waived the exceptions to the admission of evidence, contends, that the jury should have been instructed in accordance with its first request, that upon all the evidence the plaintiffs could not recover. If it be assumed that under R. L. c. 104, § 27,* and the decision in *Doolan v. Pocasset Manuf. Co.* 200 Mass. 200, there was evidence for the jury of the defendant's negligence, the more difficult question is whether

* Relating to safety devices for elevators.

the plaintiffs were properly allowed to go to the jury on the question of the decedent's due care.

The roving for the mules was kept in the card room below, and the back boys, among whom was the decedent, when roving was needed passed down the stairway and returned with it by way of the elevator. When in operation the trap doors at the level of the different floors automatically opened as the elevator approached, and closed after it had passed, while the counterweight rope, being attached with the elevator rope to the same drum, moved with equal speed. The space bounded by the guide posts had not been enclosed, and as the elevator ascended the counterweight unwound passing from story to story through holes cut in the floors.

The defendant does not deny that in some unexplained manner the decedent was struck and killed by the counterweight. It is urged by the plaintiffs, that the jury could have found that, while the decedent was looking through the hole to ascertain whether there was any roving in the card room before going for it, the elevator, having been set in motion, ascended, opening the doors of the platform, by one of which he was caught and held while the counterweight came down and killed him. It was in evidence that a few days before the accident the second hand of the mule room directed him "when he wanted roving to go down stairs and get it," but this direction did not assume that he would look through the counterweight hole before doing his work in the usual way. A safe mode of communication between the card room and the mule room having been provided, if the decedent to gain time or for other personal reasons chose to use some other method, he did so voluntarily. *Galvin v. Old Colony Railroad*, 162 Mass. 533. Appreciation of the danger of contact with a moving appliance depended upon his sense of sight and ability to comprehend the possibility of bodily harm, which are not shown to have been limited to such an extent as to prevent his comprehension of conditions where the mechanism of an elevator which had been frequently operated by him in the performance of his regular duties was plainly visible. *Regan v. Lombard*, 192 Mass. 319, 323. *Goudie v. Foster*, 202 Mass. 226, 228. *Healy v. Gilchrist Co.* 205 Mass. 393.

No eyewitness saw his movements on the day of the accident

from the time he started in the direction of the elevator until his lifeless body was found with the head partially in the hole in the mule room floor, and the counterweight resting upon the side of the face. Previously to his employment by the defendant he had worked as back boy in several mills, and whether he acted with ordinary prudence for a youth of his years and understanding could be ascertained only from his conduct before and during the opening of the doors. The position he at first assumed, and what precautions he may have taken to ascertain whether the elevator was moving, and to avoid coming in contact with it before or while using the hole as a means of observation, are matters of pure conjecture. The burden of offering some affirmative proof rested on the plaintiffs. It is not sufficient that an hypothesis which accounts for the injury without his fault is more reasonably probable than the defendant's theory which attributes it to his negligence. *Crowell v. Moley*, 188 Mass. 116. If the evidence is viewed in the light most favorable to the plaintiffs, this inquiry results in an irremovable uncertainty, and the jury should have been instructed that the action could not be maintained. *St. 1909, c. 514, §§ 127-133. Taylor v. Hennessey*, 200 Mass. 263. *Prince v. Lowell Electric Light Co.* 201 Mass. 276. *French v. Sabin*, 202 Mass. 240.

Exceptions sustained.

ANGELO MISTRETTA vs. GUISEPPE CUTULLE.

Suffolk. January 7, 1913. — January 8, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Civil, Election between counts.

Where the declaration in an action of contract contains two counts, one on an instrument in writing purporting to be a promissory note and the other on an account annexed for money lent, if the plaintiff elects to rely on his count for money lent and there is evidence to support it, he is entitled to go to the jury on that count.

BY THE COURT. The plaintiff's declaration contained two counts, one on a written instrument described as a promissory

note and the other on an account annexed for money lent. At the close of the evidence he elected to rely upon the second count. There was evidence to support his claim on this count and the presiding judge rightly refused to direct a verdict for the defendant. There is nothing in the defendant's contention, which in substance is that as matter of pleading the plaintiff could recover only on the first count.

Exceptions overruled.

The case was submitted on briefs.

J. E. Crowley, for the defendant.

E. M. Shanley, for the plaintiff.

JAMES GIVEN vs. HIRAM JOHNSON & another.

Middlesex. January 10, 1913. — January 13, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Civil, Appeal.

An appeal to this court in a proceeding at law brings before the court only the record, which in the present case disclosed no error.

PETITION, filed in the First District Court of Eastern Middlesex on October 22, 1910, and, on appeal, filed in the Superior Court on March 6, 1911, to vacate a judgment against the petitioner in an action of contract.

On June 26, 1911, *Fox, J.*, in a letter addressed to the assistant clerk of the courts for the county of Middlesex ordered that the entry should be made "Petition dismissed with costs." This letter also contained a direction to return the briefs to the parties and to keep the "requests" on the files. On July 3, 1911, the petitioner filed a paper containing the following statement: "Respectfully represents your petitioner, James Given, who requests the court to give the rulings of law and findings of facts in the above entitled cause." On September 6, 1911, the respond-

ents filed a motion that the request for rulings of law and findings of fact be dismissed and that judgment be entered for the respondents. On February 15, 1912, this motion was allowed. On March 4, 1912, the petitioner filed a paper containing the following statement: "Now comes the petitioner in the above entitled cause and appeals from the order, dismissing his request for findings of fact and rulings of law and also from the order allowing the respondents' motion for judgment, both orders being entered on the 15th day of February, 1912."

Three requests of the petitioner were printed with the record before this court. The first two requests were for rulings of law and the third was for the finding of a particular fact. It was stated in the briefs of the parties that these requests were presented to Fox, J., at the time of the hearing before him in March, 1911. Opposite the first request was the word "Yes" and opposite the second request was the word "No." It was stated in the petitioner's brief that these words were written in pencil.

D. B. Beard, for the petitioner.

W. H. Hastings, for the respondents.

BY THE COURT. An appeal in a proceeding at law brings before this court only the record. If it be assumed in favor of the petitioner that his requests for rulings with the marginal note of refusal were incorporated into the letter of the judge by which he ordered the petition dismissed, this was no part of the record. It has been decided many times that even a memorandum signed by a judge in an action at law is not a part of the record unless inserted in a bill of exceptions or report. *Cressey v. Cressey*, ante, 191. *Regal v. Lyon*, 212 Mass. 230, and cases cited in each opinion. There is no error apparent upon this record. If the petitioner seasonably presented pertinent requests for rulings, and the trial judge either refused them or made an adverse finding without passing upon them, his remedy was by taking exceptions at the time and filing a bill of exceptions within a proper time thereafter. *John Hetherington & Sons v. William Firth Co.* 210 Mass. 8, 17. *Hurley v. Boston Elevated Railway*, 213 Mass. 192. But the petitioner took no exception, nor did he file any bill of exceptions. He did nothing except to make a request that the judge pass upon his requests for rulings, which apparently the judge already had done, and that he make findings of fact,

which the judge was not required to make by any rule or practice. *O'Neill v. County of Worcester*, 210 Mass. 374, 377. The judgment was entered rightly.

Judgment affirmed.

OLNEY R. CROSIER vs. RICHARD H. SHACK.

Franklin. September 17, 1912. — January 27, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Way, Private: extent of easement. *Deed*, Construction. *Automobile*. *Words*, "Necessary use," "As now used."

In a suit in equity, against the owner of land adjoining that of the plaintiff, to enjoin the defendant from obstructing the use by the plaintiff of a certain right of way across the defendant's land for the passage of an automobile and of a paint cart, it appeared that, when the land of the plaintiff and of the defendant was owned by a common grantor, such grantor conveyed to the plaintiff with his land "the necessary use of a private right of way from said Goose Lane as now used, across our premises on the east and south sides of said house to the within granted premises," and that by a later deed the same grantor conveyed to the defendant his land "excepting the right of way on the east and south sides of the house on the granted premises, as now used by and recently deeded to" the plaintiff. Goose Lane was a public way on which both lots of land abutted, and the plaintiff's lot also abutted on another public way. A master found, on evidence warranting such a finding, that "the right to use the way . . . for driving an automobile, paint carts, teams, and otherwise in a similar way, to the barn and the rear of the buildings on the plaintiff's premises and as used by the plaintiff," was "reasonably necessary for the full enjoyment of said premises." *Held*, that the words "necessary use" in the grant of the way to the plaintiff meant not a use by necessity but such use as was reasonably necessary to the full enjoyment of the plaintiff's land, that the words "as now used" were descriptive of the location of the way and not of the nature or manner of its use, and that the use reasonably necessary to the plaintiff's full enjoyment of the premises might vary from time to time with what constituted such full enjoyment, so that the plaintiff was entitled to a decree protecting him in his right to use the way for driving an automobile as well as for driving a paint cart.

MORTON, J. The plaintiff and the defendant own adjoining premises on the southerly side of Goose Lane, so called, a public street in the village of Shelburne Falls in the town of Shelburne. The defendant's premises are bounded on the west by the plaintiff's, and the plaintiff's on the west by Main Street, one of the

principal streets in the village. Both the plaintiff and the defendant derive title from a common grantor. The deeds were executed and delivered in 1904, the plaintiff's on April 25, and the defendant's on July 1. The deed to the plaintiff contains the following grant of a right of way to the plaintiff over the premises now belonging to the defendant: "Also the necessary use of a private right of way from said Goose Lane as now used, across our premises on the east and south sides of said house to the within granted premises." The deed to the defendant contained the following exception of the right of way thus granted: "Excepting the right of way on the east and south sides of the house on the granted premises, as now used by and recently deeded to O. R. Crosier." This is a bill in equity to restrain the defendant from obstructing the plaintiff in the use of the way thus granted. The case was sent to a master and on the coming in of his report a decree * was entered from which both parties appealed.

On the premises belonging to the plaintiff is a dwelling house occupied by him and fronting on Main Street. Connected with the dwelling house and fronting on Goose Lane is a building which has been used by the plaintiff as a paint shop. Near the southeast corner of his premises is a barn. There is a dwelling house on the defendant's premises occupied by him and fronting on Goose Lane. Attached to the dwelling house are a woodshed and a small outbuilding. The entire tract of land owned by both parties is practically level, and both Goose Lane and Main Street are practically on a level with the premises all the way round. It is practicable to go directly east on the plaintiff's premises from Main Street to the barn. During the past two years the plaintiff has been using the barn as a place for keeping his automobile. The master finds that "Prior to 1904, these premises entire had for a very long term of years been owned by the same person, and rented in part and used together as one property. During all this time access to the inside yard for the delivery of wood, coal, groceries and other things necessary and convenient for the use of the property by truck teams or otherwise, had been gained by entering upon the premises near the easterly end, from off Goose Lane," along the right of way in question, "while cer-

* Made in the Superior Court by *Aiken*, C. J. The master was Samuel D. Conant, Esquire.

tain goods and articles of merchandise had been put into the buildings along Goose Lane directly from the Lane." The master further finds that the plaintiff "leased and occupied the premises he now owns for twelve or fifteen years or more prior to the time of his purchase, and that during a part or all of said time and since he has become the owner, he has run his paint cart in and out over this way, and since he has become the owner he has carried long ladders over the way upon this paint cart, but it did not appear whether he had or had not done so prior to his purchase. The way has not been used for the passage of automobiles until within about two years last past." The defendant objected to the use of the way by the plaintiff for an automobile and a paint cart, but not for "other purposes, incident to the use of his property for ordinary family and household purposes." The master finds, "If it is material, . . . that the right to use the way mentioned in the plaintiff's deed, for driving an automobile, paint carts, teams and otherwise in a similar way, to the barn and the rear of the buildings on the plaintiff's premises and as used by the plaintiff, is reasonably necessary for the full enjoyment of said premises."

The decree required the plaintiff to desist from using the way for an automobile, which was what he appealed from, and enjoined the defendant "from interfering with the use by the plaintiff of said way from Goose Lane, in such manner as the said way has been used by the plaintiff during his occupation of the premises as a tenant, for ordinary and necessary household purposes and in his business as a painter, and in particular, from interfering with the use of said way as a passage-way for the plaintiff's paint carts whether loaded with ladders, goods or other implements of the painter's trade."

The defendant contends that by "necessary use" is meant use by necessity; — in other words that the way which is granted is a way by necessity. If that is not so then he contends that in the use of the way the plaintiff is limited to such use as was made of it at the time of the conveyance to him on April 25, 1904. We do not think that either contention can be maintained. A way by necessity is the subject of an implied not of an express grant. In the present case to construe the grant as that of a way by necessity would be to render the grant nugatory, since it is manifest

that the plaintiff can enter upon and reach all parts of his premises from Main Street. The fact that the way in question might be more convenient or advantageous would not render it a way by necessity. Moreover the grant in the present case was of a way that was in existence. The words, "as now used," are descriptive of the location of the way, not of the nature or manner of the use. We think therefore that by "necessary use" is meant not a use by necessity, but such use as is reasonably necessary to the full enjoyment of the plaintiff's premises. The master has found as already quoted, that "the right to use the way . . . for driving an automobile, paint carts, teams and otherwise in a similar way, to the barn and the rear of the buildings on the plaintiff's premises and as used by the plaintiff, is reasonably necessary for the full enjoyment of said premises." And we think that in view of the facts found by him as to the use of the way during the time that both premises had belonged to the same person and during the time that the plaintiff had occupied as a tenant the premises now owned by him, the finding was well warranted by the evidence before him. The establishment and use of such a way in connection with the premises now belonging to the plaintiff would go far to show that the use of it was regarded as reasonably necessary to the full enjoyment of those premises.

There is nothing we think in the grant contained in the plaintiff's deed or in the exception contained in the defendant's deed which limits the use of the way by the plaintiff to such use as he was making of it at the time of the conveyance to him. Any use reasonably necessary to the full enjoyment of his premises may be made of the way by him. And the use of it may vary from time to time with what is necessary to constitute full enjoyment of his premises. We think therefore that so much of the decree as requires the plaintiff to desist from using the way for an automobile should be reversed.

The result is that the plaintiff's appeal is sustained and the defendant's appeal dismissed, and the decree as modified affirmed, with costs.

So ordered.

F. J. Lawler, for the plaintiff.

W. A. Davenport, for the defendant.

BRIDGET NORTON vs. MICHAEL T. HUDNER.

Bristol. October 28, 1912. — January 27, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, In care of floor of market.

The presence upon the floor of a market, that was sprinkled with sawdust twice a day, of a piece of meat covered with sawdust upon which a woman customer slipped and was injured, is not evidence of negligence on the part of the proprietor of the market, if it does not appear how long the piece of meat had been on the floor or how it got there or how it became covered with sawdust.

TORT for personal injuries sustained by the plaintiff from slipping on the floor of the defendant's market at the corner of Borden Street and Main Street in Fall River on November 15, 1907. Writ dated June 20, 1908.

In the Superior Court the case was tried before *Fox, J.*, who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant. The plaintiff alleged exceptions.

D. R. Radovsky, for the plaintiff.

D. F. Slade, for the defendant.

BY THE COURT. The plaintiff went into the defendant's market to buy meat and butter and, after purchasing the butter, as she turned to go to the meat counter, slipped, as she testified, upon a piece of meat covered with sawdust, and fell, receiving the injuries complained of. The floor of the market was covered with sawdust. A man was employed by the defendant whose duty it was to sweep the floor and keep it clean. He was engaged all the time in the performance of this duty. This man was dead at the time of the trial. Sawdust was sprinkled over the floor twice a day, about eight or nine in the morning and two or three in the afternoon. The meat counter was used only for meats cut up for sale. No trimming or anything of the kind was done on the counter. Occasionally a piece of meat would get on the floor. A verdict was directed for the defendant and the case is here on the plaintiff's exceptions.

The defendant was bound to keep his premises in a reasonably safe condition for the use of those who visited the store at his invitation, and he is liable to the plaintiff for an injury caused by his negligence while she was visiting the store at his invitation and was herself in the exercise of due care. *Gilbert v. Nagle*, 118 Mass. 278. There was evidence of the plaintiff's due care, but we fail to find any evidence of negligence on the part of the defendant. The only evidence of negligence was the presence upon the floor of the piece of meat that caused the plaintiff to slip and fall. That could not be found to constitute negligence unless the meat had been there such a length of time that the defendant or his servants knew or ought in the exercise of due care to have known that it was there and to have removed it. There was nothing to show how long it had been there. The fact that it was covered with sawdust, as the plaintiff testified that it was, had no tendency to show how long it had been there. Whether it was there when the floor was sprinkled with sawdust and should then have been seen and removed, or whether it had fallen or had been knocked from the meat counter a moment or two before and had become speedily covered with sawdust (it being undisputed that the floor was covered with sawdust all the time), were purely matters of conjecture. The case is different from *Anjou v. Boston Elevated Railway*, 208 Mass. 273, relied on by the plaintiff. In that case there was evidence relating to the condition and appearance of the banana peel from which it could be fairly inferred that it had been on the platform for a considerable period of time in such a position that it would have been seen and removed if the defendant's employees had performed their duty. In this case no one, not even the plaintiff, testified to seeing the piece of meat, and the only evidence relating to its appearance was the statement made by the plaintiff that it was covered with sawdust. The present case is more like *Goddard v. Boston & Maine Railroad*, 179 Mass. 52, where there was nothing to show how the banana peel got on the platform or how long it had been there, and the court held that the plaintiff could not recover.

We do not think that is enough to show negligence on the part of the defendant.

Exceptions overruled.

JULIENNE BEAUREGARD & another vs. BENJAMIN F. SMITH
COMPANY.

Bristol. October 28, 1912. — January 27, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability. *Evidence*, Officer's return, Opinion. *Practice*, Civil, Exceptions.

In an action under the employers' liability act against a corporation for causing the death of one of its workmen, it is no defense that, after the employment of such workman and before the accident which caused his death, the defendant had transferred to another corporation the business in which such workman was employed, if the deceased workman had no knowledge of a change in his employer and was not put upon inquiry in regard to such a change.

At the trial of an action under the employers' liability act against a corporation for causing the death of one of its workmen, where the defense relied upon is that before the accident which caused the death of such workman the defendant had transferred to another corporation the business in which the workman was employed, and where the defendant admits the service upon it of a notice of the accident which has been read at the trial, the plaintiff may be allowed to show by the oral testimony of the officer who made such service, that he served the notice upon the defendant in a certain office, near the door of which was a sign bearing the defendant's name, this being material to show that the defendant still was doing business at the time that the workman was killed, and being a matter apart from the officer's official return of service of the notice.

An exception to the exclusion of a question to a witness will not be sustained where it does not appear what the witness's answer would have been.

Where it is a material issue for the jury which of two corporations was doing certain work in which a workman was injured, the superintendent of the person for whom the work was being done, who says that he has personal knowledge on the subject, should not be allowed to testify to his conclusion as to who was doing the work, although he properly may be allowed to state all the facts and circumstances within his knowledge bearing upon this question.

TORT under the employers' liability act by the parents of Alexander Beauregard, as his next of kin, to recover for his instant death without conscious suffering on December 13, 1909, alleged in the first count to have been caused by a defect in the ways, works or machinery of the defendant, and alleged in the second count to have been caused by the negligence of a superintendent of the defendant. Writ dated March 23, 1910.

The answer was a general denial.

In the Superior Court the case was tried before *Hall, J.* The defense principally relied upon was that the plaintiffs' son on and after November 9, 1909, was in the employ of another corporation and was not in the employ of the defendant. It appeared that before November 9, 1909, the plaintiffs' son had been employed by the defendant as a laborer in a ledge which the defendant was engaged in blasting out, in the course of constructing a building in New Bedford known as the Nashawena Mills; that the plaintiffs' son continued working in and about this ledge as a laborer up to the time of his death, which occurred at about eleven o'clock on the morning of December 13, 1909, while he was acting as signal man in whistling to notify the engineer when to operate a derrick in use on the ledge; and that his death was caused by the falling of the derrick.

The defendant introduced evidence tending to show that the defendant was incorporated under the laws of Rhode Island on March 10, 1898; that it operated a saw mill and planing mill at Pawtucket in that State, and also was engaged in the construction business, taking contracts for the erection of buildings in Massachusetts and in other States; that in the autumn of 1909, the defendant decided to sell out its construction business and confine itself to its saw mill and planing mill work, and that for the purpose of purchasing such construction business a new corporation was formed under the laws of this Commonwealth on November 6, 1909, which was called the B. F. Smith Construction Company; that the new company had a capital stock of \$300,000, held by thirty or forty stockholders; that Benjamin F. Smith was president of both companies; but that all the other officers were different; that on November 9, 1910, the defendant transferred to the new corporation its entire construction business, including all its outstanding contracts; that about \$48,000 then was due on the unfinished contracts and that this amount was collected by the new company for its own use, as well as the money that became due for completing contracts; that after November 9, 1909, the defendant had nothing whatever to do with the construction business, which was conducted entirely by the new company for its own benefit; that the transfer was made between the two companies upon the basis that the defendant should receive fifty-one per cent of the capital stock

of the new company in payment for the construction business and that the new company should retain forty-nine per cent of its capital stock in its treasury to sell for the purpose of raising a working capital; that up to the time of the trial the new company had sold at par about \$90,000 worth of its stock, the proceeds of which it had used as working capital; that after November 9, 1909, none of the men, from the superintendent down, who had been in the employ of the defendant at the Nashawena Mills were employed by the defendant; that they all were taken over by the new company, who also engaged new foremen and conducted the business as it saw fit; that the plaintiffs' son continued in the employ of the new corporation after the transfer; and that no notice of the transfer was given to the employees except to the general superintendent in charge of the work. There was no direct evidence that the plaintiffs' son knew of the transfer of the business.

The judge, in regard to the notice of the transfer, instructed the jury as follows:

"On the other hand, if you should find that this was a valid *bona fide* transaction; that for sound business and prudential reasons, and for no other purpose, this defendant did transfer its assets, its credits, and its contracts in good faith to the B. F. Smith Construction Company, then another question would arise for your consideration; and that question is, did Beauregard have knowledge of that transfer? In answering that inquiry you are to take the evidence, and all of it, and determine that as a question of fact. Is there anything here either from evidence, or fair deduction from it, or from the circumstances fairly arising in this case, that leads you to the conclusion that Beauregard knew that there had been a transfer of employer or employment?

"On the other hand, is there anything that put him on his inquiry to know if there was any such changed condition at the quarry, either in the persons who directed him, who gave him orders, change of instrumentalities, of doing business, change in the conduct of the business, change in the terms or time of payment, change in wages or change in manner of the payments? Was there anything anywhere arising out of this case that should have put this deceased Alexander Beauregard upon his inquiry, because if you find upon the second branch of inquiry, that there

were sound prudential reasons for this transfer, and that it was in fact made, then I instruct you, that, if Beauregard did not have knowledge of this transfer, either from some person authorized to give it; or that the whole transaction was such that he was not bound to be put upon his inquiry; or having been put upon his inquiry, that there was nothing that would lead him as a sound reasonable prudent man to believe that there had been a change of employment, then I shall instruct you that, if you do so find, and all the other branches of this case with respect to liability are made out, these plaintiffs, as the next of kin of the deceased Alexander Beauregard, can recover."

The defendant excepted to so much of the judge's charge as permitted the plaintiffs to recover if the plaintiffs' son did not have notice of the transfer from the defendant to the B. F. Smith Construction Company, calling attention to the paragraph of the charge last above quoted.

The testimony of the deputy sheriff, excepted to by the defendant and referred to in the opinion as admitted properly, was to the effect that the witness served a notice of the accident upon the defendant at an office in a certain building in New Bedford and that in the corridor near the door of the office there was a sign bearing the name of the defendant. Before this evidence was offered the notice of the accident had been read at the trial and the defendant had admitted that it had been served upon the defendant. The defendant objected to the evidence on the ground that it was not the officer's official return of the service and that the fact of the service could be shown only by such return. It was admitted by the judge as tending to show that the service was made on the defendant at the office in question, there being near it in the corridor a sign bearing the defendant's name. The plaintiff contended that the evidence was admissible to show that the defendant still was doing business in New Bedford at the time that the plaintiffs' son was killed.

The witness Burton, the question put to whom is referred to in the opinion as having been excluded properly, was the superintendent of the Nashawena Mills and was called as a witness by the defendant. He testified that he knew of his own knowledge who was doing the work for the Nashawena Mills on December 13, 1909. The judge refused to allow the defendant

to ask the witness the question, "Who was doing the work?" but permitted the defendant to examine him in regard to "all the transactions that the Nashawena Mills had with any person or persons, corporation or corporations, that were engaged in the work."

The jury returned a verdict for the plaintiffs in the sum of \$3,000; and the defendant alleged exceptions.

H. W. Hervey, (*D. F. Slade* with him,) for the defendant.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiffs.

HAMMOND, J. This action was brought under the so called employers' liability statute by the parents of one Beauregard, deceased, who were dependent in part at least upon him for support, to recover damages for his death. The case was submitted to the jury upon the first and second counts of the declaration, the first alleging defective ways, works or machinery, the second negligence of a superintendent.

One of the grounds of defense was that at the time of the accident, December 13, 1909, the deceased was not in the employ of the defendant. While the evidence upon this branch of the case was conflicting, still the jury could properly have found that the assignment made of the building contract by the defendant to the B. F. Smith Construction Company, hereafter for convenience called the new company, was made in good faith; that, in accordance therewith, at the time of the accident the defendant had entirely ceased to have anything whatever to do with the work, that none of the ways, works or machinery was owned by the defendant or used in its business, but all were owned, used and controlled exclusively by the new company, and that the deceased and all the persons engaged with him in the work, including all those for whose negligence the plaintiffs' attempt to hold the defendant answerable, were actually in the exclusive employ of the new company.

In this state of the evidence as to this branch of the case the jury were instructed in substance that, even if the jury should thus find, still the plaintiff would not thereby be barred from recovery, if the deceased had no knowledge of the change of his employer or was not put upon his inquiry with reference to such change. The record fairly raises the question whether this instruction was correct.

At the time of the contract of service between the deceased and the defendant certain obligations, some at common law and some under the statute, were entered into by the defendant. One was that of paying the deceased his wages during the continuance of the contract. Another was the statutory liability as to the condition of the ways, works or machinery and as to the conduct of the superintendent, both during the continuance of the contract.

In cases like the present the contract continues until terminated by one party with the knowledge of the other or at least under circumstances putting him on inquiry. Not until it has been so terminated is either party released from the burden. This rule is applicable not only to the payment of wages, but to the fulfilment of the other contractual obligations. The delinquent party is held not on the actual condition of things, but on their condition as the other party has the right under the contract to assume them to be. The rule is founded upon principles of justice and fair dealing. The instruction was correct. *Perry v. Simpson Waterproof Manuf. Co.* 37 Conn. 520. *Marietta & North Georgia Railroad v. Hilburn*, 75 Ga. 379. *Missouri, Kansas & Texas Railway v. Ferch*, 18 Tex. Civ. App. 46. See also for a discussion of some of the general principles of the subject, *Nickerson v. Russell*, 172 Mass. 584, and *Berry v. New York Central & Hudson River Railroad*, 202 Mass. 197, and cases therein cited. 26 Cyc. 1087 and cases cited.

The testimony of the deputy sheriff was properly admitted. It had a bearing on the question whether the defendant was still engaged in the work, and had no reference to his official return of the service of the notice.

The exception to the exclusion of the question put to the witness Burton, as to who was doing the work, must be overruled. In the first place it does not appear what the answer would have been, and secondly the judge ruled that the witness might state all the facts and circumstances bearing upon the question as to who was doing the work. That was enough.

All the other exceptions are waived.

Exceptions overruled.

WARREN A. WILKINS vs. BOSTON and NORTHERN STREET
RAILWAY COMPANY.

Essex. November 6, 1912. — January 27, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway. *Evidence*, Presumptions and burden of proof.

In an action against a street railway company for injuries caused by the collision of an electric car of the defendant with a wagon in which the plaintiff was driving, when he was turning from one street of a town into another and in order to do so was obliged to cross a single track of the defendant laid at the side of the street into which he was turning, the defendant admitted that there was evidence of negligence in the operation of the car, and the plaintiff testified that, as he approached the street into which he was about to turn, he listened for a street car or an automobile and heard no noise of an electric motor or of the buzzing of a wire, that he also looked along the track and saw no car at that time, and that he knew that no car was due at that place for nearly ten minutes, that he then proceeded to cross the track, seeing the defendant's car when it was too late to avoid it, and that the car, moving at an unreasonable rate of speed, struck the hind wheel of his wagon. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury.

In an action of tort for personal injuries, where the direct testimony of the plaintiff, with the other evidence in the case, warrants a verdict for the plaintiff, if there is a discrepancy between some of the answers of the plaintiff on his cross-examination and his direct testimony, this is a matter for the jury to weigh and consider and does not justify the presiding judge in ordering a verdict for the defendant.

In driving from one street of a town into another at a right angle with it, where it is necessary to cross a single track of a street railway to pass into the second street, if at or near the corner which the driver is turning there is a tree which obstructs his vision, he is not necessarily wanting in due care in not stopping and looking again after passing the tree to see whether a street car is approaching on the track, if he listened and looked reasonably before reaching the tree. The rule of law that a traveller on a highway approaching a crossing of a steam railroad necessarily must look and listen in order to be in the exercise of due care does not apply to a traveller about to cross a single track of a street railway on a street of a town.

TORT for injuries to the person and property of the plaintiff alleged to have been caused by negligence of the servants of the defendant in operating one of its electric cars at an excessive rate of speed, by reason of which the car came in collision with the

hind wheel of the plaintiff's wagon when he was driving a pair of horses attached to the wagon and was turning from Pope Street into Centre Street in the town of Danvers at a little after nine o'clock on the evening of August 15, 1908. Writ dated September 25, 1908.

In the Superior Court the case was tried before *Ratigan, J.* The essential facts are stated briefly in the opinion. The defendant's track on which the car was running at the time of the accident was a single track laid at the side of Centre Street where that street was entered from Pope Street, so that a person driving from Pope Street necessarily would have to cross the track to get into Centre Street.

At the close of the evidence the defendant admitted that there was evidence which would warrant the jury in finding that its servants were negligent in the operation of the car.

At the request of the defendant, the judge ruled that the plaintiff was not in the exercise of due care, and ordered a verdict for the defendant. The judge reported the case for determination by this court, with an agreement of the parties, that, if the question of the plaintiff's due care should have been submitted to the jury, the case was to be sent back to the Superior Court for a trial on the assessment of damages only; and that, if the ruling of the judge that the plaintiff was not in the exercise of due care was correct, judgment was to be entered for the defendant.

W. B. Sullivan, (J. J. Gaffney & J. W. Corcoran with him,) for the plaintiff.

M. L. Sullivan, (J. J. Ronan with him,) for the defendant.

SHELDON, J. The only question presented by this report is whether the jury would have been warranted in finding that the plaintiff was in the exercise of due care at the time of the collision between the defendant's electric car and his wagon. The question must be answered in the affirmative. He testified that as he approached Centre Street he listened for a car or an automobile, but heard no noise of an electric motor or the buzzing of a wire. He also looked, but saw no car until it was too late. Moreover, there was here only a single track, and on his testimony no car was due to pass at this place for nearly ten minutes. There was evidence that the defendant's car was going unreasonably fast. Under these circumstances the issue as to his due care was for the

jury. *Berry v. Newton & Boston Street Railway*, 209 Mass. 100, and cases cited.

If there was a discrepancy between the plaintiff's evidence given in chief and some of his answers under cross-examination, this raised only a question for the jury. *McCarthy v. Boston Elevated Railway*, 208 Mass. 512.

The fact that the plaintiff's vision was obstructed by a tree at or near the corner of Centre Street is not decisive against him. The case of *Kelly v. Wakefield & Stoneham Street Railway*, 175 Mass. 331, upon which the defendant relies, was explained when that case came again before the court in 179 Mass. 542. The rule laid down as to railroad crossings is of course not applicable here. See the cases collected in *Berry v. Newton & Boston Street Railway*, 209 Mass. 100, 103.

Upon the terms of the report and the agreement of the parties, the verdict for the defendant must be set aside, and the case must stand for the assessment of damages only.

So ordered.



CHARLES O. YOUNG *vs.* BOSTON and NORTHERN STREET
RAILWAY COMPANY.

Essex. November 6, 1912. — January 27, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Negligence, Street railway.

It is not necessarily negligent for a passenger in a street railway car, who has signalled to the conductor for the car to be stopped at a regular stopping place which it is approaching, when the conductor has pulled the bell but the speed of the car has not been slackened, to leave his seat at the side of the car and walk to the door, and then to stand inside the doorway grasping one side of it firmly with his hand, although he knows that the car is moving at a high rate of speed and is about to pass over a switch where there is likely to be a lurch.

For a street railway car, which has been running at an excessive rate of speed, to pass with undiminished speed over a switch and in doing so to give a sudden lurch, "like being snapped on the end of a whip," throwing a passenger, who is standing inside the doorway with a firm grasp on one side of it, against

the controller box and completely down on the vestibule floor, and throwing another standing passenger across and upon a seat so that he grasps the window sill to save himself from falling, is evidence of negligence in the operation of the car.

TORT for personal injuries sustained when the plaintiff was a passenger on an electric street car of the defendant on Lynn Street in the town of Peabody on the evening of January 27, 1910. Writ dated March 29, 1910.

In the Superior Court the case was tried before *Fessenden, J.*

The plaintiff testified that he boarded a car of the defendant at Peabody Square about 8.35 o'clock in the evening to go to his home on Lynn Street in Peabody; that he had been travelling over this route morning, noon and night for about three years; that the track on Lynn Street was a single track with a turnout in front of the plaintiff's house; that his house was about midway of this turnout; that at the Peabody end of the turnout was a white post, a stopping post; that this post was about one hundred and twenty feet distant from the switch that a car passes over in entering upon the turnout in travelling from Peabody to Lynn; that on the night in question the plaintiff was seated eight or ten feet from the rear door, the seats running lengthwise of the car; that as the car approached that white post and before it got to it, he motioned to the conductor; that the conductor pulled the bell, but that the car did not slacken its speed; that he got up and stepped to the rear door to notify the conductor that he wanted to get off; that he did not step through the doorway but "grabbed hold of the side of the door with his hand;" that at this time the car was going at a high rate of speed and that when it struck the switch it "wrenched his grasp from the door and threw him out into the vestibule against the controller box and completely down onto the vestibule floor," causing the injury complained of; that when the car struck the switch "it seemed like being snapped on the end of a whip;" that "there was quite a racket and it seemed as if the car was going over;" that the car did not come to a stop until it travelled a full length of the car below the next white post at the Lynn end of the turnout; that the plaintiff had been in the habit of signalling to get out at the white post at the Peabody end of the turnout because the cars always on a signal for that post ran up to the switch and that that made it a little nearer

and a little handier for him than to ride to the white post at the Lynn end of the turnout.

The plaintiff further testified that in passing to the rear door he did not pass by any passengers and there was no one in the vestibule other than the conductor; that he stood at the door long enough to take a good grip of the door jamb; that he did not take any particular time in going to the door, did not go slow or run; that the car was going at a high rate of speed, but that he could not describe it exactly; that, after he had stood at the door long enough to get a good grip, something happened, the car went from right to left and that as the car went from right to left he went out into the vestibule, head first; that he was taken right off his feet; that he had received an injury to his leg about sixteen months before this accident and had not wholly recovered from it.

One Hardy testified in behalf of the plaintiff that he was a passenger on the same car with the plaintiff, sitting on the opposite side of the car, a little more than half way down from the rear door; that he got up from his seat to follow the plaintiff out, and that, when the car passed over the switch at the Peabody end of the turnout, it gave a quick and sudden lurch, throwing him across the seat so that he grabbed the window sill to save himself from falling; that at the time of the lurch the plaintiff was standing at the door, inside of the car; that as the car approached the Peabody end of the turnout it was going twice or more than twice as fast as it generally did over that turnout; that he had been accustomed to ride frequently on these cars; that on the night in question this car did not come to a stop until it had reached the white post at the Lynn end of the turnout; that the lurch not only threw him across the seat but upon the seat.

A witness, who occupied the house next to that of the plaintiff, testified that at the time of the accident he was awakened from sleep by the unusually loud noise made by the car in going over the turnout.

At the close of the evidence the judge at the request of the defendant ordered a verdict for the defendant, and at the request of the parties reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment should be entered for the defendant; and that, if the

case should have been submitted to the jury, judgment should be entered for the plaintiff in the sum of \$325 with costs.

The case was submitted on briefs.

W. H. Niles & E. S. Underwood, for the plaintiff.

M. L. Sullivan & J. J. Ronan, for the defendant.

SHELDON, J. The question of the plaintiff's due care was for the jury. It could be found that when he left his seat he had signalled for the car to be stopped at a regular stopping place which it was approaching, and that he had a right to expect, although that had not yet been done, that the speed of the car would be slackened and the car stopped to allow him to alight. In this respect the case resembles in principle *Farnon v. Boston & Albany Railroad*, 180 Mass. 212. It is not necessarily negligent for a passenger, even upon a steam railroad when the train is coming to a station at which he is to alight, to leave his seat and walk to the door of the car, that he may be ready to go out with the promptness that may be needful. *Worthen v. Grand Trunk Railway*, 125 Mass. 99. *Barden v. Boston, Clinton & Fitchburg Railroad*, 121 Mass. 426. *A fortiori*, this is true of a passenger in a street railway car. *Larson v. Boston Elevated Railway*, 212 Mass. 262. Nor was it negligent as matter of law for him to stand at the car door with the firm hold that he testified that he had thereon, in the expectation that the speed would be lessened so as to make the stop which he well might anticipate would be made. No doubt from his knowledge that the car was moving at a very high rate of speed, that its swaying was already unusual, and that it was about to pass over a switch, where there was likely to be a lurch, it reasonably might have been expected that the jury would say that he was negligent; but the issue was still for them and not for the court.

There was evidence also of the defendant's negligence, even apart from the excessive speed with which it could be found that the car was sent over the switch. It is of course true that this negligence cannot be found from the bare fact that there was a lurch of the car and that injury resulted, even though witnesses might testify that the lurch was an unusual one. But here there was something more. The jury could find that the evidence brought the case within the rule stated in *Work v. Boston Elevated Railway*, 207 Mass. 447. In that case, Mr. Justice Loring has

collected the decisions made since *McGann v. Boston Elevated Railway*, 199 Mass. 446, in which the earlier cases are cited. Later decisions are *Craig v. Boston Elevated Railway*, 207 Mass. 548; *McCarthy v. Boston Elevated Railway*, 207 Mass. 551; *McCarthy v. Boston Elevated Railway*, 208 Mass. 512; and *Webber v. Old Colony Street Railway*, 210 Mass. 432.

The case should have been submitted to the jury. The verdict for the defendant must be set aside; and under the terms of the report judgment must be entered for the plaintiff for \$325 and costs.

So ordered.

SYLVESTER BROWN vs. INHABITANTS OF NAHANT.

Essex. November 6, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

License. Intoxicating Liquor. Municipal Corporations. Contract, Implied in law.

In assuming for the purposes of decision, that money paid for a license to sell intoxicating liquors can be recovered in an action of contract upon proof that the license for which the money was paid was void *ab initio*, it was said by the court that this point never has been decided in this Commonwealth.

Under R. L. c. 100 and amendments thereof, licenses to sell intoxicating liquors in a town cannot be granted by the town itself but can be granted only by the selectmen of the town acting as public officers under authority of the Commonwealth, and the fees paid for such licenses are not paid to the town but to the treasurer of the town likewise acting as a public officer and not as an agent of the town.

Where the treasurer of a town under the provision of R. L. c. 100, § 45, pays to the treasurer of the Commonwealth one fourth of the amount received for licenses for the sale of intoxicating liquors granted by the selectmen of the town, the remaining three fourths of such license fees, when turned into the treasury of the town, are received as a part of the distribution made by the town treasurer as a public officer and not as payments made to the town by the persons to whom the licenses were granted; so that such a licensee cannot recover from the town the amount of a license fee on the ground that he paid it under a mistake of fact, because there was no transaction between the town and the licensee, and because a town cannot be held liable for the act of a public officer, although enjoying the advantage of it, unless a remedy is given by statute.

If a tenant of the United States occupying a building on land of the United States, which has been acquired by purchase and by condemnation proceedings for the purposes of national defense but has not yet been used for such purposes, chooses to apply to the selectmen of the town in which the property is situated for a

license to sell intoxicating liquors and is granted such a license, he cannot afterwards recover the money that he voluntarily paid for such license, whether or not he lawfully could have carried on his business without the license.

CONTRACT to recover from the town of Nahant money paid in the years 1904, 1905 and 1906 for licenses to sell intoxicating liquors at the Tri-Mountain House, alleged to have been in a United States reservation and not in the town of Nahant during those years. Writ dated November 19, 1908.

In the Superior Court the case was submitted to *Bell, J.*, upon an agreed statement of facts, which included the following:

By St. 1902, c. 373, the consent of the Commonwealth was granted to the United States to acquire by purchase or condemnation a tract of land in the town of Nahant containing about forty-five acres, to be described in the plans provided for in § 4 of the act, to be used for the purposes of national defense. By § 4 it was provided that the act should be void unless a suitable plan or plans of the premises acquired by the United States under the act should be deposited in the office of the secretary of the Commonwealth within six months after the acquisition thereof.

On February 5, 1904, by a decree of the District Court of the United States, the tract including the land on which the Tri-Mountain House was situated was condemned to public uses of the United States. On June 8, 1904, the United States filed a plan of this reservation in the office of the Secretary of State of the Commonwealth.

U. S. St. February 2, 1901, c. 192, § 38, 31 U. S. Sts. at Large, 758, is as follows: "The sale of or dealing in, beer, wine or any intoxicating liquors by any person in any post exchange or canteen or army transport or upon any premises used for military purposes by the United States, is hereby prohibited. The Secretary of War is hereby directed to carry the provisions of this section into full force and effect."

For many years up to and including 1906, the plaintiff applied for and was granted a license of the first class to sell intoxicating liquors to be drunk upon the premises at the Tri-Mountain House during the summer season, in accordance with the provisions of Chapter 100 of the Revised Laws and of the corresponding provisions of earlier laws, and he continued to sell liquor and to conduct the business of a summer hotel there until November, 1906.

The plaintiff paid a license fee of \$1,000 in each of the years 1904, 1905 and 1906.

On April 1, 1900, the United States had acquired by purchase and deed the tract of land including the site of the Tri-Mountain House. At that time the plaintiff had a lease of the Tri-Mountain House which did not expire until April 1, 1903. On July 30, 1903, the plaintiff received from the Secretary of War, a new lease of the premises for five years, dating from April 1, 1903. This lease was revoked on April 1, 1907, and a new lease was given to the plaintiff in place of it. The deed to the United States was recorded on January 4, 1901. On and after April 1, 1900, the plaintiff was a tenant of the United States and paid rent to the United States. The plaintiff continued to be a tenant of the United States and to pay rent for the premises up to and including November 15, 1907. In each of the years 1904, 1905 and 1906 the plaintiff paid to the United States an internal revenue tax of \$25 a year on the business of a retail liquor dealer at the Tri-Mountain House. On November 7, 1906, authorized representatives of the United States forbade the plaintiff to deal in or sell beer, wine or any intoxicating liquors upon the premises of the Tri-Mountain House. No use of the reservation including the Tri-Mountain House was made by the United States for purposes of national defense before November 7, 1906.

"The sum of \$3,000 paid by the plaintiff for the said licenses went into the treasury of the town of Nahant, and three fourths of said amount, namely, \$2,250 was retained by the town of Nahant and expended by it for municipal purposes. The balance was paid to the Commonwealth in good faith as required by law. A demand was made upon the town of Nahant for the return of the money paid for the licenses on September 12, 1908."

It was agreed that no question of pleading should be raised. It also was agreed that the court might draw all proper inferences from the facts agreed upon.

The judge ruled that the action could not be maintained and found for the defendant. By agreement of the parties he reported the case for determination by this court. If his ruling was correct, judgment was to be entered for the defendant; if upon the case stated the plaintiff was entitled to judgment, such judgment was to be ordered for \$2,250 or for \$3,000 as this court might deem

just, or such other order was to be entered as in the opinion of the court justice and equity required.

The case was submitted on briefs.

S. Parsons & H. A. Bowen, for the plaintiff.

W. H. Niles & H. R. Mayo, for the defendant.

SHELDON, J. The plaintiff seeks to recover from the defendant town certain sums of money which he avers he paid to the defendant, in three successive years, for licenses to sell intoxicating liquor granted by it to him. See R. L. c. 100, and the acts in amendment thereof. His claim is that he paid his money to the defendant and took the licenses from it under a mistake of fact, in that he supposed that the building specified in the licenses was a part of the defendant town and that the town had jurisdiction and authority to grant the licenses for sales to be made in that building, whereas in fact the building stood upon land which had become part of a United States reservation and subject to the control and jurisdiction of the United States, under St. 1902, c. 373; and he contends that for this reason the licenses which he says that the town granted to him were void, and that he is entitled to have his moneys returned to him. The case comes to us upon an agreed statement of facts, with power to draw inferences therefrom.

If we assume, what never has been decided in this Commonwealth, that the plaintiff, if otherwise entitled to do so, could maintain his action upon proof that these licenses were void *ab initio*, there are yet serious difficulties in his path.

The licenses were not granted to him by the town of Nahant or in any sense by its authority. They could have been granted only by the selectmen of the town. These selectmen, in passing upon his applications and granting him licenses, acted merely as public officers under the authority of the Commonwealth, and the moneys which he paid as license fees were not really paid to the town, but to the treasurer of the town, likewise acting as a public officer and not as an agent of the town. *McGinnis v. Medway*, 176 Mass. 67. *Taber v. New Bedford*, 177 Mass. 197. R. L. c. 100, § 42. It is because the treasurer receives such money as a public officer and not as an agent or servant of the town that the liability for interest, if he makes delay in paying the required part to the Commonwealth, is imposed upon him personally and

not upon the town. R. L. c. 100, § 45. If, as the parties have said, the plaintiff's payments were made to the town, this can mean only that they were paid in hand to the town to be by it at once turned over to its treasurer, the only officer who had authority to receive the payments. Certainly this necessarily appears from the facts agreed. And it is agreed that no question of pleading is raised.

Three fourths of the amount of these license fees did actually come into the town treasury; but that amount came mingled with the same proportional part of all the license fees that were received by the town treasurer, and not in any sense as the money of the plaintiff. There was absolutely no transaction between the plaintiff and the defendant town. But it is a general principle in this Commonwealth that no action will lie against any city or town for the act of a public officer, though inuring to its advantage, unless the right of action has been given by statute. Accordingly it was expressly declared in *McGinnis v. Medway*, 176 Mass. 67, that a city or town is not responsible for any acts of its licensing board, whether a special commission or the mayor and aldermen, or, as here, the selectmen of a town. We know of no statute which creates such responsibility in a case like this. See St. 1902, c. 171. There could have been here no mistake of fact common to the plaintiff and the defendant town.

Nor, under the circumstances here presented, has the plaintiff failed to enjoy the benefit of his licenses. The tract of land which includes his premises and over which jurisdiction was granted to the United States by St. 1902, c. 373, was to be used by the United States only for purposes of national defense. It did not begin to be so used until November, 1906. Until that time nothing in the Act of Congress of February 2, 1901, (U. S. St. c. 192, § 38,) made the plaintiff's business unlawful, and in the meantime he continued his business under the protection of the licenses which he had obtained from the selectmen. Under the strict terms of St. 1902, c. 373, § 2, there is room for doubt whether without his licenses he lawfully could have carried on his business during the time that they were in force. See *Palmer v. Barrett*, 162 U. S. 399. At any rate, when he applied to the selectmen for licenses, those officers had a right to believe that he chose to make himself safe from any danger of prosecution by taking licenses to sell

intoxicating liquors at his house. Altering somewhat the language of Mr. Justice Holmes in *Alton v. First National Bank of Webster*, 157 Mass. 341, 344, this was a matter equally open for the inquiry and the judgment of the plaintiff and the selectmen, and the latter had the right to assume that the plaintiff relied wholly on his own means of information. He chose to apply for licenses in the manner provided by law; the public officers whose duty it was to consider the question granted his applications; he voluntarily took the licenses which they consented to give him, and paid to the proper public officer (whether directly or indirectly is not material) the license fees. He cannot now exact from the town the return of that part of his money which finally went into its treasury any more than he can require the Commonwealth to repay to him the amount which came into its hands.

We see no ground upon which the action can be maintained. Though this exact point apparently has not been passed upon, somewhat similar questions have been decided in the same way. *Cook v. Boston*, 9 Allen, 393. *Emery v. Lowell*, 127 Mass. 138. *Kraft v. Keokuk*, 14 Iowa, 86. *Edinburg v. Hackney*, 54 Ind. 83. *Brazil v. Kress*, 55 Ind. 14. *Cahaba v. Burnett*, 34 Ala. 400. *Tupelo v. Beard*, 56 Miss. 532. *Custin v. Viroqua*, 67 Wis. 314. Judgment must be for the defendant.
So ordered.



J. SIDNEY ALLEN & another, administrators *de bonis non* with the will annexed, vs. THOMAS H. HUNT, executor, & others.

Essex. November 6, 1912. — January 27, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Devise and Legacy, What interest passes. *Executor and Administrator*. *Equity Jurisdiction*, In suit against executor or administrator, Adequate remedy in Probate Court.

Where a testator named his wife as the sole executrix of his will and devised and bequeathed to her the whole of his estate "to be used and enjoyed by her for her comfort and support during her natural life" with a provision that any part of his estate "not used by her for her comfort and support during her natural

life," after the payment of two small legacies, should go in equal shares to certain nephews and a niece, it was *held*, that the testator's widow took only a beneficial interest for life with a limited power of disposal, and that therefore the bequest over was valid.

In this Commonwealth a court of equity will not take jurisdiction of a suit against an executor or administrator, who has not fully administered the estate of his testator or intestate, for an accounting, where the objection is seasonably taken and afterwards insisted on that there is a plain, adequate and complete remedy in the Probate Court.

BILL IN EQUITY, filed in the Superior Court on November 4, 1909, by the administrators *de bonis non* with the will annexed of the estate of Samuel Nelson Hardy against the executor of the will of Ann Maria Hardy, who was the widow of Samuel Nelson Hardy, and a bank and a trust company, to determine whether certain deposits and certain shares of capital stock belonged to the estate of Samuel Nelson Hardy, and, if they did, to compel the payment of such deposits and the transfer of such shares of stock to the plaintiffs as such administrators.

In the Superior Court the case was referred to Forrest L. Evans, Esquire, as master, and later was heard by *Brown, J.*, upon the exceptions of the defendant executor to the master's report. The judge made a final decree granting the relief prayed for, and the defendant executor appealed.

The first three articles of the will of Samuel Nelson Hardy were as follows:

"Article I. After the payment of my just debts and funeral charges, I give, devise and bequeath all my property and estate, of whatever nature, real, personal or mixed, and wherever situated, of which I may die seized and possessed, or to which I may be entitled, or of which I may have the right of disposal at the time of my decease, to my beloved wife, Ann Maria Hardy, provided she be living at the time of my decease to be used and enjoyed by her for her comfort and support during her natural life.

"Article II. In case there shall be any part of my estate, given, devised and bequeathed as aforesaid to my said wife, Ann Maria Hardy, not used by her for her comfort and support during her natural life, and shall be remaining upon her decease, such property and estate, of whatever nature, real, personal or mixed, and wherever situated, I give, devise and bequeath in the following manner:

"1. To my cousin, Charles Nelson Hardy, for his name, three hundred dollars.

"2. To Fanny Nelson Allen, for her name, two hundred dollars.

"Article III. All the rest and residue of my estate, of whatever nature, real, personal or mixed, and wherever situated, remaining at the time of the decease of my said wife, Ann Maria Hardy, I give, devise and bequeath to my three nephews, Frank Hardy, William Nelson McKenzie and William Nelson Hardy, and my niece, Lucy Mary Parsons, to be divided equally between them, share and share alike."

The testator's wife, Ann Maria Hardy, was made executrix.

The estate of the testator at the time of his death included no real estate and consisted of certain bonds and shares of stock, \$1,000 of life insurance and a deposit in a bank. At the time of the death of Ann Maria Hardy there were standing in her name a deposit in the City National Bank of Gloucester, two deposits in the Gloucester Safe Deposit and Trust Company and seven shares of the capital stock of that trust company. Ann Maria Hardy was appointed executrix of the will of her husband in January, 1906. She continued to be such executrix until her death on July 23, 1909, without having fully administered her husband's estate. On September 6, 1909, the defendant Hunt was appointed the executor of her will. After her death Benjamin F. Allen, 2nd, was appointed administrator *de bonis non* with the will annexed of the estate of Samuel Nelson Hardy, and, said Allen having died, the present plaintiffs were appointed such administrators in his stead.

C. A. Russell, for the defendant executor.

W. A. Pew, for the plaintiffs.

HAMMOND, J. By the terms of the will the widow took simply a life estate with a limited power of disposal so far as necessary for her personal and physical comfort and well being, but for no other purpose. *Chase v. Ladd*, 153 Mass. 126. *Kent v. Morrison*, 153 Mass. 137. *Collins v. Wickwire*, 162 Mass. 143. *Price v. Bassett*, 168 Mass. 598. *Stocker v. Foster*, 178 Mass. 591. *Dana v. Dana*, 185 Mass. 156, and cases cited. The bequest over was therefore valid.

As executrix of her husband's estate the widow was bound to account to the Probate Court. She was chargeable with what

she received and was to be credited with what she paid out lawfully to creditors and for expenses of administration including a reasonable compensation for her own services as executrix, and then she was to hold the balance for her use for life under the trust named in the will, and whatever was left was to be disposed of in accordance with the will. The Probate Court was judicially to determine on the debtor side what property she should be charged with, and on the creditor side what allowance should be made to her. And the questions as to how much she received, how much she paid out, and for what, including the sum paid out under the trust, and as to what the balance was for which she or her estate was finally chargeable, were for the determination of that court in the first instance, to be settled in an accounting by her or by her personal representative. Under our system of practice equity will not take jurisdiction of such a case where the objection that there is a plain, adequate and complete remedy in the Probate Court is seasonably taken and is not waived. *Sever v. Russell*, 4 Cush. 513. *Ammidown v. Kinsey*, 144 Mass. 587. *Green v. Gaskill*, 175 Mass. 285, and cases cited. In *Chase v. Ladd*, 153 Mass. 126, cited by the plaintiffs, the point as to jurisdiction was not taken. In the case at bar there has been no final account settled. The point was seasonably taken and has been constantly insisted upon.

Bill dismissed without costs to either party.

ANNIE S. DAVIS vs. INHABITANTS OF ROCKPORT.

Essex. November 6, 1912. — January 27, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON & DECOURCY, JJ.

Municipal Corporations, Liability for torts when engaged in business for profit.

A municipality has the power to let for profit real estate held for public purposes and not needed at the time for such purposes.

If a town, holding common land within its limits on a bluff facing the sea, which is not required at the time for any public purpose, lays out such land in house lots, which it leases to tenants for a substantial rental, this is not *ultra vires*, and the town is liable to one of its tenants, in the same way that a private

owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants.

TORT against the town of Rockport for personal injuries sustained by the plaintiff by reason of the defective condition of a plank walk at Long Beach in the possession and control of the defendant as a landlord, when the plaintiff was passing over the walk as the guest of her son, who was the lessee from the defendant of certain of the lots of land referred to in the opinion, one of which was bounded by the way twelve feet in width there mentioned. Writ dated September 1, 1910.

In the Superior Court the case was tried before *Raymond, J.* The material facts shown by the evidence are stated in the opinion. By agreement of the parties the case was submitted to the judge and not to the jury. The judge ruled that the defendant was not liable and found for the defendant. He reported the case for determination by this court, with a stipulation of the parties, that, if the ruling of the judge was wrong or if the jury could have found for the plaintiff on all the evidence, judgment should be entered for the plaintiff in the sum of \$750 as of October 3, 1911; otherwise, that judgment should be entered for the defendant.

W. A. Pew, for the plaintiff.

C. H. Cleaves, for the defendant.

HAMMOND, J. There was evidence that at the time of the accident the plank was in the possession and under the control of the defendant, that it was in a defective and dangerous condition, that this condition was known by the defendant and might have been remedied before the accident by the exercise of due care on the part of its officers or agents, and that the plaintiff, being in the exercise of due care, while passing over the walk where "as the guest of her son she had a right of way by invitation or inducement of the" defendant, was injured by reason of the defect. There can be no doubt that in this state of the evidence the plaintiff would have been entitled to go to the jury if the defendant had been a private person or (with some few exceptions not here material) a private corporation; and the defendant has not contended to the contrary.

But the defendant contends that it is a quasi corporation invested with certain powers and charged with certain duties,

all public and limited in their nature, and that the acts upon which the plaintiff relies to hold the defendant were *ultra vires*, and hence it is not answerable. It becomes necessary to examine with some precision the relation sustained by the defendant to this walk.

The defendant owned about forty acres of upland and beach, all situated within the territorial limits of the town. The land was bounded on the south by the sea about twenty-five hundred feet. Fronting the beach was a sand bluff varying in height from two to eight feet, the remaining land being soft marsh and tidal ponds. Before the time of the accident the town had caused this bluff to be surveyed and laid out into house lots and plans to be made preparatory to leasing the land to persons desiring to rent summer cottages. These plans showed "[one] hundred and eighty house lots, in four tiers of lots," and open spaces, some running parallel with the beach and some substantially at right angles with it, designated as roads. A passageway, twelve feet wide along the top of the bluff and between the front tier of lots and the beach, was reserved by the town, and at the time of the accident was in the possession and under the control of the defendant. This was used, and intended by the defendant to be used, as a common passageway to and from the various lots and along the beach front.

The defendant leased the respective lots for a period not exceeding ten years, receiving a substantial rental therefor, and at the time of the accident there were outstanding leases of about one hundred lots, and about seventy houses had been constructed by the tenants. In a part of the twelve foot reservation above mentioned a plank walk had been laid by tenants in front of their lots, and some of the tenants had protected their property by building bulkheads along the front of it. One of the streets which ran from the front passageway towards the interior was called "14th Street," running between the two front lots numbered respectively thirteen and fifteen. In the spring of 1910 a part of the bank and the plank walks in the vicinity of 14th Street were washed away by a high tide during a storm, leaving a chasm five or six feet deep and of the whole width of the street, where it joined the reservation above named. Over this chasm was constructed by the defendant the defective and dangerous walk where the plaintiff was injured.

Briefly stated, the defendant laid out the bluff into house lots and ways with a view to leasing the lots to persons who might erect summer cottages, and at the time of the accident about seventy houses had been erected by tenants under leases made by the defendant. The ways including the place where the accident occurred had not been leased, nor was it intended by the defendant that they should be. There is no question that everything which was done in the name of the defendant was authorized by it so far as respects the form and substance of the votes. Were the votes and the action thereunder *ultra vires*?

The land was "common land which belonged to the town, and had never been sold or divided." The only use ever made of it was that "some of the thatch on the back part had been sold, and the public had used the beach for bathing purposes. The bluff had never been used for any public or municipal purpose." By this language we understand that this was land within the limits of the town which had not been granted by the government of the colony either to the town or to individuals. The tenure under which such land is held by the town is set forth by Gray, C. J., in *Lynn v. Nahant*, 113 Mass. 433, 448, as follows: "[Such lands are] not held by the town as its absolute property, as a private person might hold them, but, by virtue of its establishment and existence as a municipal corporation, for public uses, with power by vote of the freemen of the town to divide them among its inhabitants, yet subject to the paramount authority of the General Court, which reserved and habitually exercised the power to grant at its discretion lands so held by the town. *Commonwealth v. Roxbury*, 9 Gray, 451, 500. *West Roxbury v. Stoddard*, 7 Allen, 158, 169, 170. *Tappan v. Burnham*, 8 Allen, 65. *Boston v. Richardson*, 13 Allen, 146, 149, 150, and 105 Mass. 351, 357. 1 Mass. Col. Rec. 240, 271, 277, 305, 310, 327. 2 Mass. Col. Rec. 61. 4 Mass. Col. Rec. pt. ii. 10, 109, 111."

The land was held by the town for public purposes. But it does not appear that during the time covered by the acts of the defendant as hereinafter set forth there was any public purpose for which it was needed or to which it could have been appropriately devoted. The defendant then found itself in possession of real estate more and other than what was required for the then present needs of the town. It was in the situation in which the town of Quincy

was when its city hall was larger than was required for the time being for use as such, and when it let for profit the unused part of the building for business purposes (*French v. Quincy*, 3 Allen, 9); in the condition in which the city of New Bedford was when it let for profits parts of its city hall under like circumstances (*Wor-den v. New Bedford*, 131 Mass. 23). In each of these two cases the defendant was held to stand in the position of a private owner. The principles upon which the question of the liability of the municipality turns were set forth in the last case above cited, in the following language (p. 24): "A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be."

It can make no difference that the portion let is a part of a building or of land. The principle upon which in each of these two cases the defendant was held is applicable here; and it may thus be stated in a general form. A municipality has the power to let for profit real estate held for public purposes and not needed for the present for such a purpose. It is not compelled to let the property lie idle. While it may not expend money to go into business, it may lease the property on reasonable terms and receive the rents. If some minor expense is needed to make the property rentable, such for instance as for a new key, a new blind or new steps in the case of a building, or for suitable ways in the case of vacant land either by levelling the land or making plank walks, such expense within reasonable limits may be legally incurred.

We see nothing *ultra vires* in the acts of the defendant. It either could allow the property to remain unused or it could let the same or any part thereof for profit. If it took the former course, it

was answerable only as a municipality in possession of property intended for public use. If it took the latter course then it became answerable as a private owner. See in addition to the cases hereinbefore cited, *Oliver v. Worcester*, 102 Mass. 489; *Little v. Holyoke*, 177 Mass. 114; *Davies v. Boston*, 190 Mass. 194, and cases cited. It follows that by the terms of the report upon which the case is submitted to us there should be, and it is hereby so ordered,

Judgment for the plaintiff for \$750.

DANIEL J. MCKINNON vs. PITMAN AND BROWN COMPANY.

Essex. November 7, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

At the trial of an action by a carpenter against his employer for personal injuries, there was evidence tending to show that the plaintiff, who had begun to learn the trade of a carpenter only a year before, was directed by the foreman under whom he worked, who had called him from other work for the purpose, to get upon a wooden canopy attached to a building in order to assist in removing the canopy, that he did so without knowing or being informed how the canopy was attached to the building, that, while he was working upon the canopy, a fellow workman, seeing the canopy move, shouted to him, "Look out," and that he continued with the work, not understanding that the warning related to the condition of the canopy, but thinking that it related to danger to other persons from the throwing down of boards, that the canopy fell because it was insufficiently fastened to the building and that the plaintiff was injured. *Held*, that a finding was warranted that the plaintiff at the time of his injury was in the exercise of due care.

In an action by an employee against his employer for injuries caused by the falling of a wooden canopy attached to a building while the plaintiff was at work upon the canopy tearing it down, there was evidence tending to show that the plaintiff was inexperienced in his work, that the canopy fell because it was insecurely fastened to the building, that the plaintiff was doing his work as he was directed to by a superintendent of the defendant and within fifteen feet of him, that the superintendent, before he directed the plaintiff to get upon the canopy, knew that it formerly had been supported by columns which had been taken down and that therefore it was not likely that it was intended to be supported by its fastening to the building, and that just before the canopy fell it moved enough to attract attention, showing its insecurity. The superintendent testified that

he had told the plaintiff to keep off from a timber upon which the roof timbers of the canopy rested. *Held*, that a finding was warranted, that the plaintiff's injury was due to negligence of the superintendent.

TORT under St. 1909, c. 514, § 127, cl. 2, for personal injuries received by the plaintiff while in the employ of the defendant as stated in the opinion. Writ dated August 1, 1910.

In the Superior Court the case was tried before *Ratigan, J.* The material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Pew, for the plaintiff.

F. B. Kendall, for the defendant.

DE COURCY, J. The plaintiff seeks to recover for personal injuries alleged to have been caused by the negligence of a statutory superintendent of the defendant. There was evidence on which the jury could find the following facts.

The platform of the railroad station at Magnolia had been covered by a roof or shed that was supported on lines of posts, and all of this covering had been taken down by the defendant except the part that was connected with and extended four or five feet from the station. The roof of this remaining portion was joined to the station roof and formed a canopy over the door.

The plaintiff was sent by one Lockwood to tear down one side of this canopy. He stood upon a ladder while he removed the shingles and some of the roof, and then was directed by Lockwood to get upon the canopy while removing the remaining boards. The plaintiff then stood upon the timber known as the plate, upon which the roof timbers rested, and was prying off the rafters next to the building, by the direction and in sight of Lockwood, when one side of the canopy went down, carrying the plaintiff with it and injuring him. It then became apparent that this plate had been fastened to the station solely by six or eight nails "toed" into the corner of the building, and that the bracket underneath was attached in the same manner.

During the time when the plaintiff was standing upon the plate, one of the other workmen noticed that it moved or "worked" at the end near the building and called aloud to the plaintiff a warning to "Look out," as it might come down. Lockwood was

not more than ten or fifteen feet away at the time, and his attention was attracted by the speaker's voice.

The plaintiff was entitled to go to the jury on the issue of his due care. He was not an experienced carpenter, and had begun to learn the trade but a year before the accident. The supporting columns and all the roof of the platform with the exception of this remnant had been taken down before he came to this work. He was called from other work to this by the foreman, who wanted it to be done in a hurry. He was not informed how the plate was attached to the building, no time was allowed him to make an examination, and he had no reason to suppose that it was a place of danger. He might properly rely somewhat on the supposed knowledge of his experienced foreman, who undertook to direct specifically how the work should be performed. The warning of a fellow workman was understood by him as referring to the throwing down of the boards where they were likely to injure others, and not as relating to any danger involved in his standing upon the plate.

There was ample evidence that Lockwood was a statutory superintendent. In the absence of the general superintendent, who was not at Magnolia on the day of the accident, he had full charge of the work and of the men.

Whether the evidence would warrant a finding that by the exercise of reasonable care he would have known that the plate was a dangerous platform to support the plaintiff, and hence that he was guilty of negligent superintendence in sending the plaintiff there, is a close question. But we think that the plaintiff was entitled to go to the jury on this issue also. Lockwood knew that the plate and the roof resting thereon had been supported on columns before all but this canopy had been taken down. A carpenter with his experience well might anticipate that a plate thus supported probably would not be mortised into the building; and an inspection would have shown him that the bracket served the purpose of ornament rather than of useful construction. To send an inexperienced man to stand upon this plate with orders to tear down the structure, without making any inspection to ascertain whether it was a safe place, properly might be considered by the jury as negligent, especially when it further appeared that the superintendent was where he could have seen the movement of

the plate and have heard the warning of a fellow workman. It is significant, too, that Lockwood testified that he expressly told the plaintiff to keep off the plate, thus indicating that he believed there was danger in working there.

No defense of assumption of risk is set up in the defendant's answer. Regardless of the question of pleading, negligent superintendence under the statute is not assumed by a workman in his contract of employment.

Without further recital of the evidence in favor of the plaintiff, we are of opinion that it entitled him to have the case submitted to the jury.

Exceptions sustained.

MATT HILDONEN vs. ROCKPORT GRANITE COMPANY.

Essex. November 7, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, In blasting.

At the trial of an action by a workman in a quarry against his employer to recover for injuries caused by the plaintiff being struck by a stone which was thrown by a blast from a pit adjoining that in which the plaintiff was working against the side of the pit and rebounded, it appeared that before the blast a warning was given to the workmen such as was required for a seam blast which was expected to cause only so many rocks to fly as the workmen could protect themselves from without leaving the pit, and the plaintiff contended that the defendant should have given a warning such as was used by the employer in case of heavy blasts when a great many stones were expected to fly. The plaintiff introduced in evidence interrogatories which he had propounded to the defendant and the answers thereto, from which it appeared that a seam blast generally was not called a heavy blast unless five or more kegs of powder were used, that for the blast which caused the injury only a keg and a half of powder was used, and that ample time was given for the workmen to protect themselves before the blast. There was no evidence controlling or contradicting the answers to the interrogatories, and none tending to show that the person in charge of giving the warning had reasonable ground to expect, that many stones would be thrown out by the blast. *Held*, that the jury would not have been warranted in finding the defendant liable.

TORT by an employee in a quarry of the defendant to recover for personal injuries caused by being struck by a stone thrown from a pit by a blast. Writ dated October 20, 1910.

In the Superior Court the case was tried before *Ratigan, J.* The material facts are stated in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Pew, for the plaintiff.

H. F. Hurlburt, Jr., for the defendant.

DECOURCY, J. There appears to be no substantial conflict in the evidence as to the following facts: The defendant operated a stone quarry comprising two pits, the old or large one being about six hundred feet long, four hundred feet wide and one hundred and fifty feet deep, and the new or small one, which was northeast of the other, being about two hundred feet long, one hundred and twenty-five feet wide and sixty-five feet deep. These pits were separated by a granite wall, varying in height from one hundred to one hundred and fifty feet from the bottom of the old pit, and from twenty to sixty-five feet above the bottom of the new one. In the northwest corner of the new pit there was a stone about eight feet long, four and a half feet wide and sixteen feet deep, that had been entirely disconnected from the ledge. It was separated from the surrounding ledge by seams on its northern and western sides, and the rock had been entirely removed on the eastern and southern sides, except a "toe" that lapped over the western end of the southerly side of the stone, but was free from it.

This large stone had been moved some six or seven inches before the day of the accident, and the defendant's foreman, one Johnson, undertook to push it farther down the slanting bed of the pit. Powder to the amount of a keg and a half, or about thirty-seven pounds, was lowered into the seam on the western side of the stone, the blast was prepared and covered with earth in the usual manner; the steam whistle then was sounded three times, and after the lapse of a minute or more the charge was fired. The plaintiff had been working in the old pit, about thirty feet from its eastern wall, and when the warning whistle sounded he stopped his work and walked about twenty feet toward the centre of the pit. While he was looking up at the stones thrown by the blast that were coming through the air, he was struck by one of them and injured.

Blasts were made in one pit or the other a number of times every day, and there were three different kinds of warning used.

In the case of very light blasts, where no stone was expected to fly, Johnson would warn the employees in the immediate vicinity to "look out" and they would move away. The second kind, which was given at the time of the accident, as explained by the plaintiff, was "when they used powder in a place or seam where they think or believe some rocks will fly;" then "they blow the whistle three times and tell the men to look out for themselves. . . . The men then look out for themselves. . . . They protect themselves by looking up and dodging stones that come down." The third method of warning was used in case of very heavy blasts, when "they think a great many stones will fly;" then the whistle is blown and the men are ordered to come out of the pits. The alleged negligence relied on by the plaintiff was that of Johnson in failing to use the third method of warning and thereby order the men out of the pit at the time of the accident. Clearly there was not evidence to sustain any other of the many allegations in the declaration; and the obvious risks incident to this dangerous employment as ordinarily and properly conducted were assumed by the plaintiff, who was an experienced quarryman.

Upon the main question in controversy, whether at the time of this accident the third method of warning should have been given instead of the second, there was evidence introduced by the plaintiff that a seam blast was not generally considered a very heavy blast, such as to call for ordering the employees out of an adjoining pit, unless five or more kegs of powder were used; and that for the blast in question, where only a keg and a half were used, it was Johnson's duty to see that a warning whistle was blown, and that sufficient time was given for employees to protect themselves if they saw fit; and further that ample time was given for this at the time of the accident. It is true that this evidence came from answers filed by the defendant to the plaintiff's written interrogatories, but the plaintiff, with ample knowledge thereof, produced no witness who contradicted or controlled it. The only other testimony bearing upon the question whether the third method of warning should have been used was that of the plaintiff and some others to the effect that it was customarily given when they put the powder in a place from which they knew or thought a great many stones would fly. But no evidence was introduced to show that Johnson, when he fired the charge, had

reasonable grounds to expect that many stones would be thrown under the circumstances existing here, where a comparatively small amount of powder was placed in a seam blast for the purpose of pushing the stone down the sloping bed of the quarry. In fact when this same stone was moved a few days before and apparently by the same kind of blasting charge, it does not appear that any stones were thrown. And it may be added that the proximate cause of the injury was not the large number of stones, but a single stone which rebounded from the side of the quarry, — something which might occur in the case of any ordinary blast.

Without considering the issues of the plaintiff's due care and assumption of risk, we are of opinion that the trial court was right in ruling that the jury would not be warranted in finding the defendant liable upon the evidence presented.

Exceptions overruled.

STEWART BROWNE vs. JOSEPH FAIRHALL, executor.

Essex. November 8, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Performance and breach, Construction. Executor and Administrator. Survival of Action.

In an action against an executor for the breach by the defendant of a contract under seal made by the defendant's testator, the defendant contended that the obligation of the testator was personal and that performance of the contract had been rendered impossible by his death. The contract was for the sale to the testator of certain securities and provided for payment within ninety days from the date of the contract in part in cash and in part by the testator's interest bearing promissory notes, payable to himself on or before three years from the date of the contract and by him indorsed in blank, and that within the ninety days "all the moneys, checks, securities, deeds and documents" to be paid or delivered by either party to the other should be deposited as escrows with a designated trust company. The contract closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties, "as to each and all of its provisions, whether so expressed in appropriate words or not." The testator died forty-two days after the date of the contract without having made any of the deliveries called for by the contract. *Held*, that the contract could not be enforced against the executor. *Held, also*,

that the express stipulation that the contract should bind the heirs, executors and administrators of the parties referred only to the performance of the obligations growing out of the contract after all the papers and instruments required by it had been delivered as escrows to the trust company.

CONTRACT for a breach by the defendant of the contract in writing described in the opinion. Writ dated November 13, 1909.

In the Superior Court the case was tried before *Raymond*, J. The material facts are stated in the opinion. At the close of the evidence the defendant asked for the following rulings:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. The covenants and agreements under the contract, on the part of the defendant's testator, were personal, were not intended to be and, as a matter of law, are not binding upon his estate.

"3. As the contract required the defendant's testator to give his personal note or notes to the amount of \$200,000 payable at such time or times within three years from their date as the testator himself should determine, his death renders the performance of the contract in this respect impossible, and the defendant could give no note or notes under the contract that would be binding upon the estate."

These rulings were refused subject to exceptions by the defendant. There was a verdict for the plaintiff. The presiding judge reported the case for determination by this court, the report stating that, if there was error in his rulings upon the defendant's request and the action did not survive, judgment was to be entered for the defendant.

C. A. Sayward, (*J. P. Sweeney* with him,) for the defendant.

R. O. Harris, (*W. A. Morse* with him,) for the plaintiff.

SHELDON, J. The first question in this case is whether the cause of action declared on survived the death of John B. Browne, hereinafter called the testator. Perhaps a more exact statement of this question would be, whether by reason of the death of the testator the agreement between the original parties became impossible of fulfilment, and whether the parties to the agreement foresaw that this contingency might arise and guarded against it by their stipulations, so that there still may be a remedy upon the contract, even though an exact performance of all its provisions

may have become impossible by reason of the death of one party to the agreement.

The agreement was dated July 30, 1908. By its terms the plaintiff agreed to sell to the testator certain stock and bonds of a New York corporation. For these the testator agreed to pay to the plaintiff within ninety days from the date of the agreement the sum of \$1,375,000 in cash, and \$200,000 in the testator's own promissory notes payable on or before three years after the date of the agreement, bearing interest payable semi-annually at the rate of six per cent per year, made payable to the testator's own order and indorsed by him in blank, and to convey to the plaintiff by warranty deed certain described real estate situated in Chicago, Illinois, subject to a stated mortgage, with a policy of insurance upon the title, the premium upon which was to be paid by the plaintiff. Besides other stipulations not now material, the parties also agreed that within ninety days from the date of the agreement "all the moneys, checks, securities, deeds and documents" to be paid or delivered by either one to the other should be delivered in escrow to a trust company named, to be delivered by the trust company to the parties finally entitled thereto by the agreement. The agreement closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties "as to each and all of its provisions, whether so expressed in appropriate words or not." A supplemental instrument annexed to the principal agreement and bearing the same date provided in detail for the deliveries to be made in escrow to the trust company and for the deliveries to be made by that company to each one of the parties respectively.

The testator died on September 10, 1908, before the expiration of the ninety days which have been mentioned, not having (as we understand to be agreed by both parties to the action) made any of the deliveries, and of course being not yet in default by reason of such non-delivery.

This agreement provided in express terms for the performance by the testator of certain acts which could be done only by himself in person. In part payment for the stocks and bonds which he was to buy, he was to give to the plaintiff his own promissory notes for \$200,000, drawn payable to his own order and in-

dorsed by himself in blank. These notes, it is plain, were to be drawn in such numbers and for such respective amounts as he should himself see fit, subject only to the requirement that they must together amount to the stipulated sum. They were to be payable at such time or times, within the prescribed limit of three years, as he should elect. The expectation that he might make at least some of them run for a somewhat protracted period is shown by the stipulation that they should bear interest payable semi-annually at the rate of six per cent per year. The notes were to be wholly unsecured, which shows that the personal responsibility of the maker was of weight in the minds of the parties. In the event which has happened, neither party could require the notes of any other person, or any other securities, or even a cash payment, to be substituted for these notes. Neither the testator nor his heirs or executor could be compelled to pay this large sum in any other way than that which had been stipulated for, by the testator's own notes, drawn as he might personally choose to draw them, in the respects which have been mentioned. The plaintiff could not have been required to accept payment of this amount either in money or in any other securities whatsoever; especially he could not have been required to accept notes given by heirs or an executor, with whose responsibility he might not have been content and by whose option in the particulars stated he had not agreed to abide. Of course the executor in his representative capacity could not bind the estate of the testator by giving such notes in the absence of authority delegated to him by the will. *Grafton National Bank v. Wing*, 172 Mass. 513. *Hadlock v. Brooks*, 178 Mass. 425, 438. *Howe v. Richardson*, 186 Mass. 259. But no such power is given by the will of this testator. Even if the plaintiff had consented to receive the notes of the executor instead of those of the testator, which does not appear, yet the executor could not have been required to give his own notes, or indeed any other notes than those specified in the agreement.

It follows that at the time fixed for the performance of the agreement, such performance had become impossible as to a material part of what was to be done by the testator. Without the performance of what thus had become impossible, neither party had the right to require fulfilment of the agreement by the other,

unless both parties had agreed upon some substitute for that which no longer was capable of being done, and that is not the case here. The performance of this agreement depended upon the ability of the testator to exercise the option which was given to him as to the number, the respective amounts and the dates of payment of the promissory notes which he was to give to the plaintiff. If before exercising that option and drawing and delivering these notes he had lost his senses and had become a mere lunatic, no longer capable of exercising his option and of acting thereon, the agreement would have been terminated, because the very basis of this material stipulation was that he should exercise his option. Performance of the whole agreement became impossible because it had become impossible to carry out one of its essential terms by giving the promissory notes of the testator such as had been contracted for, and the court cannot substitute for the giving of these notes any other mode of payment. The case comes under the general principle that where the performance of a contract depends upon the continued existence of any particular person or thing, there, if there is no warranty of such continued existence, performance is excused if before a breach of the contract its performance becomes impossible by reason of the death or destruction of such person or thing. Some of the cases in which this principle has been declared or illustrated are collected in *Hawkes v. Kehoe*, 193 Mass. 419. *Smith v. Preston*, 170 Ill. 179, 185. We do not find in the agreements declared on anything in the nature of a warranty, or absolute covenant against the contingency which has happened, such as could bring the case within the rule of *Rowe v. Peabody*, 207 Mass. 226, or *John Soley & Sons v. Jones*, 208 Mass. 561, 566.

There is nothing against the view which we have stated except the express stipulation in the agreement that it shall bind the heirs, executors and administrators of the parties. Some effect should of course be given to these words. But it is to be observed that by the agreement each party was bound to execute within ninety days all the papers and instruments called for and to deliver them all in escrow to a designated trust company. Once this step had been taken by each party, the obstacle which now prevents performance would have been removed. The testator's option would have been fully exercised; his notes would have been

delivered in escrow, as also would have been everything of which his delivery was required. The delivery in escrow would have been valid and binding upon the estate of each party, although his death had intervened before the delivery by the trust company. *Foster v. Mansfield*, 3 Met. 412. *Daggett v. Simonds*, 173 Mass. 340, 347. *Stockwell v. Shalit*, 204 Mass. 270. The deliveries to the trust company, when completed, were to be unconditional though in escrow, not conditional upon the happening of some future event, as in *Daggett v. Daggett*, 143 Mass. 516, 520, and *Callanan v. Chapin*, 158 Mass. 113, 119, 120. When therefore these deliveries in escrow had been made, the whole agreement well might have been, and well might be declared to be, binding upon and inuring to the benefit of the heirs, executors and representatives of each party. Effect may accordingly be given to this stipulation. That no further effect need be given to it is settled by our decision in *Marvel v. Phillips*, 162 Mass. 399. In that case, the agreement which was held to have been terminated by the death of one of the parties contained a provision like that which we are now considering; and the court said that this did not provide for a substituted performance in case of the death of the party, but merely imposed upon the executor the obligation to answer for any breach of the agreement committed by the party himself. And see the language of Allen, J., in that case, on p. 401.

We may add that one of the obligations of the testator was to give, within a period which expired before his death, the bond of a surety company in a stated sum to secure the performance by him of all the agreements made by him. If he failed to do this, there was a breach by him in his lifetime, for which of course an action could be maintained. But although this breach is specifically charged in one of the counts of the plaintiff's declaration, the issue thus presented does not appear to have been passed upon at the trial; no question upon it is raised by the report; and no argument upon it has been made by either party. We infer that the issue has been waived; and we are confirmed in this inference by the fact that the report, after stating the ruling made by the judge that the action survived (and it is not disputed that the whole question of the defendant's liability hinged upon this ruling), sets out the agreement of the parties that only issues as to the

measure of damages should be submitted to the jury, and expressly says that "all other questions were finally waived."

In this posture of the case, the first and third of the defendant's requests for rulings should have been given, for the reason that the cause of action, under the circumstances here presented, did not survive against the defendant. This conclusion makes it unnecessary to consider the other questions which have been argued. Upon the terms of the report, judgment must be entered for the defendant.

So ordered.

CHARLOTTE FAIRFIELD *vs.* CITY OF SALEM.

SAME *vs.* SAME.

Essex. November 8, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Damages, In tort: avoidable consequences. *Nuisance*.

Although the plaintiff in an action for damages resulting from a nuisance cannot recover for damages which he could have avoided by the exercise of reasonable precautions, he is not required to take unreasonable steps or to commit a wrongful act or trespass upon the property of another in order to avoid damage.

At the trial of an action by the owner of a wharf against a city for damages resulting from a discharge of sewage by the defendant into the dock adjoining the wharf, there was evidence tending to show that the plaintiff had attempted to get permission from the harbor and land commissioners under R. L. c. 96, § 25, to dredge the dock and that the permission for some time had been refused; that when he did get permission, the owner of a neighboring dock, which also would have had to be dredged in order for the plaintiff's dock to be dredged, refused his permission; and that the plaintiff had been given some assurance by the public officials that the defendant would attend to the dredging. The defendant asked the judge to instruct the jury that the measure of damages "is the dredging of the dock at such times as is necessary, plus the additional cost of doing business while the dock is being dredged." The request was refused. *Held*, that the request was refused properly, as it was not applicable to the evidence.

TWO ACTIONS OF TORT for damages resulting from the discharge by the defendant of sewage into a dock adjoining a wharf of the plaintiff, the first action being for damages arising during six years preceding June 2, 1908, and the second for those arising

between that date and January 10, 1910. Writs dated June 2, 1908, and January 10, 1910.

In each action the declaration contained two counts, the first for expenses caused by the filling up of the dock and the second for diminution in the value of the plaintiff's real estate because of the water being rendered unhealthy and offensive.

The cases were referred to James W. Sullivan, Esquire, as auditor. In the Superior Court they were tried together before *Fessenden, J.* The material facts are stated in the opinion. At the close of the evidence the defendant requested the judge to instruct the jury as follows: "If the jury find that the city of Salem through its negligence has filled up the so called Fairfield dock, then the duty of the plaintiff is to keep the damage as small as possible and the measure of damage in this case is the dredging of the dock at such times as is necessary, plus the additional cost of doing business while the dock is being dredged." The request was refused.

The jury found for the plaintiff in the first action in the sum of \$4,147.99, and in the second action in the sum of \$18,877.09; and the defendant alleged exceptions.

The cases were submitted on briefs.

M. L. Sullivan & J. J. Ronan, for the defendant.

W. H. Niles & H. R. Mayo, for the plaintiff.

DECOURCY, J. The instructions requested by the defendant invoked the rule of avoidable consequences, but they failed to recognize the limitations of that rule. Although the plaintiff could recover only for the direct consequences of the defendant's wrong, and not for damages that were avoidable by the use of reasonable precautions on her part, she was not called upon to take unreasonable steps to make the loss less aggravated, nor was she required to commit a wrongful act or to trespass upon the property of another in order to abate the nuisance.

The court could not rule as matter of law that the plaintiff's only plan to follow was that of dredging the dock from time to time, and that consequently the measure of her recovery was the cost of such dredging and the damage occasioned by the incidental interference with her coal business. The instructions requested assume that the plaintiff was free to dredge the dock at any time; but this work must be done within tide water, and

there was evidence that the harbor and land commissioners refused to give the necessary permit. R. L. c. 96, § 25. When she did get permission from the commissioners in 1909, it appears that a neighbor, Langmaid, objected to any trespass upon his dock by the dredging company, and that the work upon the plaintiff's premises would be ineffectual unless the Langmaid dock also was dredged. *White v. Chapin*, 102 Mass. 138. Even if she were free to do the work the jury might consider that she was warranted in relying upon the assurance of the public officials that the city would dredge the dock. And in determining what steps the plaintiff should have taken to reduce the damages it was necessary to consider other elements, such as the cost of doing the work of dredging, the number of times that it should be done in order to remove the filling that was being deposited continuously, and the extent of interruption of the plaintiff's business. Clearly these issues of fact were for the jury; and they were submitted with instructions that were clear and complete. *Brayton v. Fall River*, 113 Mass. 218. *French v. Connecticut River Lumber Co.* 145 Mass. 261.

Exceptions overruled.

FANNIE W. SELLERS *vs.* HARRIS FRANK.

SAME *vs.* SAME.

Essex. November 8, 1912. — January 27, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DeCOURCY, JJ.

Landlord and Tenant. Contract, Implied in fact.

At the trial of an action for use and occupation of land from an August 10 to the following November 8, it appeared that during that time a part of an ell of a building of the defendant stood upon land of the plaintiff, that on August 10 the plaintiff's attorney wrote to the defendant demanding an immediate removal of that portion of the ell and stating that, if the defendant desired to hire the land on which it stood, he might do so at \$1 a day. The defendant replied stating that he felt that the plaintiff could not be harmed if the matter was allowed to stand until he had a chance to verify the claim, and requesting permission to go upon the plaintiff's land to remove the ell. On October 5 the plaintiff wrote to the defendant that thereafter the rental of the premises would be \$2 a day and that continued occupation by the defendant

would be considered as an acceptance of those terms. On the next day the defendant's attorney replied that the defendant denied the plaintiff's right to make the claim and that he had "taken steps to determine the interests of the parties." On the foregoing evidence there was a finding for the plaintiff at the rate of \$1 a day. *Held*, that the finding was warranted, as it might be inferred from the defendant's conduct that he agreed to become a tenant at the rent of \$1 a day, but that he did not acquiesce in the plaintiff's attempt to increase the rent during the tenancy.

TWO ACTIONS OF CONTRACT for use and occupation of land, the claim in the first action being \$1 a day for the fifty-three days from August 10 to October 2, 1909, and that in the second action being \$2 a day for the thirty-seven days from October 2 to November 8, 1909. Writs in the Lynn Police Court dated respectively October 2 and November 8, 1909.

On appeal to the Superior Court the cases were heard together by *Irwin, J.*, without a jury. It appeared that an ell of a building of the defendant projected between two and three feet upon land of the plaintiff. The only dealings between the parties as to the subject matter of the suit were contained in the following letters:

Previous to August 3, 1909, the plaintiff's attorney wrote to the defendant seeking an interview but not stating why he sought it. On August 3 he wrote again, stating: "Your house on said lot [referring to the lot adjoining the plaintiff's] projects over on to the property of Fannie Sellers by actual measurement four feet. I desire to see you to see if arrangements can be made to remove the house from the premises without taking any action." Receiving no reply, he wrote to the defendant again on August 10, stating: "You are hereby notified to remove forthwith that portion of your building which now is on the land of Fannie W. Sellers. If not attended to forthwith we are instructed to take action to have same removed. I am instructed to say that if you desire to hire the land on which your building rests, it will be leased to you for such term as you may desire. The rent will be one dollar per day."

On August 12, the defendant replied with a letter containing the following: "The alleged claim that that portion of the building you refer to as resting upon the land which was recently sold by my wife to her sister, Mrs. Sellers, has but recently come to my knowledge. Mrs. Sellers claims to have had the knowledge of the situation of the building some time prior to the time that I

purchased the lot. She had knowledge of that fact at the time I was induced to sign the deed conveying the adjoining lot to her, therefore I feel that she cannot be harmed, provided that the matter is allowed to stand until I have had a chance to verify her claims. In the meantime I propose to consider the advisability of cutting away that portion of the building which she claims extends on to her land. Now that she has seen fit to undertake process against me I feel it my duty that I should first get from her permission to go on to her premises in order to get at that part of the ell at the time that I seek to remove same, therefore will you be kind enough to let me know whether or not I can procure from your client, through you, a license so to do?"

The next letter which passed between the parties was one of October 5, 1909, directed to the defendant and signed in the name of the plaintiff, stating: "You are hereby notified that on and after the date hereof the rental of my premises occupied by you will be two dollars per day. Your continued occupation of these premises will be considered by me as an acceptance of these terms during the period that you so occupy them." The defendant's attorney replied on October 6, stating: "Your letter of the fifth inst., addressed to Mr. Harris Frank has been handed to me for reply. Mr. Frank denies your right to make a claim as therein specified. I have taken steps to determine the interest of the parties; due notice of which you will receive."

On October 8, the plaintiff's attorney wrote to the defendant's attorney: "Mr. Frank admitted, and his engineer corroborated him that his building was over upon our land between two and three feet, and in a letter to me promised if given time to remove the same. I am somewhat surprised at your statement now that you have taken steps to determine the interest of the parties, as I supposed that was all agreed upon or admitted. What we desire is for Mr. Frank to remove that part of the building that is upon our land, and as long as it stands upon our land we will make this claim for rent and endeavor to enforce same by suit, if necessary."

Receiving no reply, the plaintiff's attorney wrote again to the defendant on January 1, 1910, on the subject. The defendant removed the building from the plaintiff's premises in November, 1910.

The defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover. The ruling was refused, and the judge found for the plaintiff in the first action in the sum of \$53, and in the second action in the sum of \$37. The defendant alleged exceptions.

The cases were submitted on briefs.

R. W. Light, for the defendant.

J. H. Sisk, W. E. Sisk & R. L. Sisk, for the plaintiff.

DECOURCY, J. During the time covered by the declaration in these two actions, a portion of the ell of the defendant's house extended beyond his own lot and upon the adjoining land of the plaintiff. If this encroachment existed without the consent of the landowner the defendant would be a trespasser; and his occupation, even by her permission, would be only that of a mere licensee unless he was there as her tenant. The judge of the Superior Court, in finding for the plaintiff, necessarily must have found that the use and occupation by the defendant was with the permission of the plaintiff and under a contract, express or implied, that created between them the relation of landlord and tenant. *Central Mills Co. v. Hart*, 124 Mass. 123.

The sole question raised by the exceptions is whether on all the evidence it should have been ruled that the plaintiff was not entitled to recover. Although no express contract of tenancy was shown, we cannot say as matter of law that the trial judge was not warranted in inferring such an agreement from the conduct of the parties. In her letter of August 10, 1909, the plaintiff offered to let to the defendant, as tenant at will, the land upon which the ell of the building stood, and it could be found that this offer remained open until after the period for which rent is now demanded. Although the defendant's reply of August 12 was somewhat ambiguous, it certainly did not decline this offer; and neither then nor later did he claim any right to occupy the land without the plaintiff's consent. The judge well might infer from the defendant's conduct that he assented to the plaintiff's proposition, that under the contract so created he continued to occupy the premises as tenant at the rental of \$1 a day, and that he did not acquiesce in the plaintiff's attempt to increase the rent during the tenancy.

Exceptions overruled.

MARY LEONARD vs. CHARLES F. STEVENS.

Worcester. December 4, 1912. — January 27, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DECOURCY, JJ.

Agency, Scope of employment. Negligence.

A man employed to take care of horses and a carriage, one of whose ordinary duties is to drive the horses in transporting the wife or daughters of his employer whenever required by any one of them to do so without further direction of his employer and even without his knowledge in the particular instance, while thus driving the horses attached to the carriage at the request of one of the daughters is acting within the scope of his employment, and his employer is liable to a person who in crossing a street in the exercise of due care is injured by reason of the negligence of such driver while thus driving by direction of the daughter.

TORT for personal injuries from being knocked down and run over by a pair of horses and a carriage of the defendant alleged to have been driven negligently by the defendant's servant when the plaintiff was crossing Front Street in Worcester on December 25, 1908. Writ dated February 16, 1910.

In the Superior Court the case was heard before *Keating, J.* At the time of the accident the horses were being driven by one Bryant, who is mentioned in the opinion, where the evidence in regard to his duties is described. It appeared that the carriage had been ordered by the defendant's older daughter who, with a younger sister, was in the carriage at the time of the accident, and that they were being driven to the railroad station to meet a friend who was expected to arrive. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

R. B. Dodge & W. J. Taft, for the plaintiff.

C. C. Milton & F. L. Riley, for the defendant.

HAMMOND, J. The questions of the due care of the plaintiff and of the negligence of Bryant the driver of the team were for the jury. See *Murphy v. Armstrong Transfer Co.* 167 Mass. 199, and cases cited; *Hennessey v. Taylor*, 189 Mass. 583, and cases cited.

There was ample evidence that at the time of the accident Bryant was engaged in the business for which he was employed. The carriage and the horses belonged to the defendant. It appeared that Bryant had been in his employ as a hostler for thirteen months and that a part of his duty was to take care of this team and drive it. And the jury might well have found upon the evidence that one of his ordinary duties under the contract of hiring was to take the wife or daughters out to drive whenever respectively required by them, without any further action on the part of the defendant and without even his knowledge in any individual case. Indeed that is the most natural inference. *Smith v. Jordan*, 211 Mass. 269. The case is plainly distinguishable from *Bourne v. Whitman*, 209 Mass. 155, 172, cited by the defendant.

Exceptions sustained.

CHARLES D. HOLMES vs. WILLIS W. DARLING & others.

Suffolk. December 5, 1912. — January 27, 1913.

Present: HAMMOND, LORING, BRALEY, & DECOURCY, JJ.

Partnership. Equity Jurisdiction, Accounting between partners.

In a suit in equity between partners for an accounting, it appeared that the plaintiff and the defendant were engaged in buying, selling and distributing the product of a mineral spring company under a contract between that company and the defendant and his assigns providing for an exclusive agency during a period of ten years, that the defendant had assigned to the plaintiff a one half interest in such contract of agency, that the partnership agreement between the plaintiff and the defendant was for a period of ten years beginning and ending two weeks later than the contract with the mineral spring company, that, when the partnership had existed for about two years, the defendant secretly procured from the mineral spring company an extension of the contract of agency for himself individually for a further period of five years after the expiration of the ten year contract then in force, and that, when the plaintiff discovered the existence of the new contract, he insisted that it was an extension of the contract then in force and was a partnership asset. *Held*, that the defendant in secretly procuring the new contract of agency for himself alone violated his duty toward the plaintiff as his partner, and that the plaintiff was entitled to an accounting upon the new contract.

The general rule here was applied, that a partner will not be permitted to obtain for himself profits from carrying on a separate business of the same nature as

that of the partnership, but must account to his copartners for such profits and for all benefits derived from transactions concerning partnership interests and property.

BILL IN EQUITY, inserted in a common law writ of the Superior Court dated August 9, 1910, for an accounting as to the business and affairs of a partnership between the principal defendant, Willis W. Darling, and the plaintiff under articles of copartnership dated March 2, 1903.

The case was referred to Burton Payne Gray, Esquire, as master. Later the case was heard by *Pierce, J.*, upon the defendants' exceptions to the master's report and supplemental report. The facts found by the master are stated in the opinion. The judge made an interlocutory decree overruling the defendants' exceptions and confirming the reports. The judge found and ruled as matter of law that the plaintiff was entitled to an accounting upon both branches of the case, namely: upon the new contract of agency beginning March 1, 1913, and upon the "wine and whiskey accounts," so called; and, being of the opinion that this order ought to be determined by this court before any further proceedings in the Superior Court, the judge, at the request of the parties, reported the case for determination by this court of the questions arising under the order.

F. M. Forbush, (J. W. Morton with him,) for the plaintiff.

G. K. Bartlett, for the defendants.

DECOURCY, J. The defendants' exceptions to the master's report have not been argued and, except so far as they are involved in the questions discussed in this opinion, we treat them as waived. The first question arising on the report is as to the correctness of the finding and ruling of the judge of the Superior Court that the plaintiff is entitled to an accounting upon the new contract of agency for fifteen years beginning March 1, 1913.

The plaintiff and the principal defendant became equal partners on March 2, 1903, for the term of ten years. The partnership was engaged in buying, selling and distributing the products of the White Rock Mineral Spring Company, under an agreement whereby the Spring Company gave to the principal defendant and his assigns the exclusive agency for its lithia water in the states of Maine, New Hampshire, Vermont and Massachusetts for the term of ten years from February 14, 1903. The principal

defendant assigned to the plaintiff an undivided half interest in this agreement so that it should be held as a partnership asset; and the only other contribution to the new firm of Darling and Holmes was the sum of \$2,000 advanced by the plaintiff. It did not appear that the company would have refused to make the contract run to Darling and Holmes if it had been asked to do so. The active management of the business was in the hands of the principal defendant, assisted by his daughter and son.

In the absence of the evidence we must assume the following findings of the master to be established. Soon after the formation of the copartnership the relations between the partners became strained. As early as August, 1903, the principal defendant began a secret correspondence with the president of the company seeking to secure for himself individually a new contract of agency, to commence after the termination of the existing one. Statements were made in the letters tending to prejudice the president against the plaintiff. An offer by the company to extend the agency contract for a period of five years was shown to the plaintiff by the principal defendant, and subsequently was returned with a declination of the offer, and no notice of the declination was given to the plaintiff. This secret correspondence was carried on for about two years, and as a result the principal defendant finally induced the president of the company to execute to him individually the new contract of agency in question, when the existing contract had almost eight years to run. The principal defendant did not make known this transaction until some time later, and then the plaintiff insisted that the new contract amounted to an extension of the existing one and was a copartnership asset.

Partnership is a relation of trust and confidence, and the law imposes upon each partner the duty of exercising toward his co-partner the utmost integrity and good faith in all partnership affairs. In transactions concerning the interests of the firm he must consider their mutual welfare rather than his own private benefit. If the principal defendant was unwilling to continue in business with the plaintiff after the expiration of their copartnership agreement, he should at least have notified him of that fact, and have given him an equal opportunity to obtain an agency agreement at the expiration of the existing one. The value of the new agreement would depend largely upon the efforts of the part-

nership during the unexpired eight years of the old one; and during that period the principal defendant could not secretly secure for himself any private advantage such as obtaining a new lease of the premises in which the partnership business was transacted, or a new contract of agency which was the very basis and chief asset of their mutual enterprise. Any such advantage he holds in trust for the firm and he must account to his associate for the benefit received therefrom. *Leach v. Leach*, 18 Pick. 68. *Mitchell v. Read*, 84 N. Y. 556. We find no error in the action of the trial judge in finding and ruling that the plaintiff is entitled to an accounting upon the new contract of agency.

The judge also found and ruled that the plaintiff was entitled to an accounting upon the "wine and whiskey accounts," so called. The basis for such action is the report of the master, who found that the principal defendant conducted the wine and whiskey business from the office of Darling and Holmes; that he and his son, an employee of the firm, took orders for the same both at the office and on the road while selling White Rock Water; that the wine and whiskey business was contemplated under article one of the copartnership articles, and that the plaintiff has always claimed an interest in such accounts. In view of these findings of fact the case comes within the general rule that a partner will not be permitted to obtain for himself profits arising from carrying on a separate business of the same nature as that of the firm, or from transactions concerning firm interests or property, but must account to his copartner for the benefits derived therefrom.

Decree affirmed.

PATRICK CUSICK vs. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD COMPANY.

Suffolk. November 11, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by a freight handler against a railroad corporation by which he was employed for personal injuries caused by the falling of a pile of large bales of sisal grass, it appeared that the plaintiff had been a freight handler for many

years and was very familiar with the method of piling up bales, that the bales were being piled for storage, that a superintendent of the defendant ordered the plaintiff to go up on the pile and pull in one of the bales which was projecting, that the plaintiff went upon the pile, and, when he reached with his hook to draw in the bale that was projecting, the bales on which he stood went from under his feet and the pile fell. *Held*, that there was no negligence on the part of the superintendent in giving the order or in failing to warn the plaintiff of the unfinished state of the pile and the consequent danger of climbing upon it, and that the plaintiff could not recover.

TORT for personal injuries sustained by the plaintiff on October 18, 1907, when working as a freight handler on Pier 2 of the defendant in that part of Boston called South Boston, the declaration containing three counts, the first alleging a failure of the defendant to provide the plaintiff with a safe and suitable place in which to work, the second count alleging negligence of a superintendent, and the third count alleging a defect in the ways, works or machinery of the defendant. Writ dated January 17, 1908.

In the Superior Court the case was tried before *Jenney, J.* At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. P. Beckford, for the plaintiff.

J. L. Hall, for the defendant.

HAMMOND, J. The plaintiff with several fellow workmen was piling up for storage large bales of sisal grass, called by the workmen "a kind of hemp." He was engaged in trucking the bales on a large two-wheel truck to the pile from another part of the floor, although it is a fair inference from the record that he was liable at any time to be called to exchange work with either of his fellows. While the work was in progress the plaintiff was ordered by Wells, the person superintending the work, to pull in a bale which was out of line.

As to the circumstances of the accident the plaintiff testified as follows: "When I came back with the truck with the bale on it Mr. Wells said — 'Cusick, you go right up and pull that bale, it is projecting out, pull it in.' . . . It was the outside bale altogether, . . . the fourth bale up . . . from the floor. These bales were a little larger than the ordinary bale of hay you see passing on any team on the street." Three men were on the pile

at the time; one was at the bottom and the others of the gang were trucking to the pile. "When Mr. Wells spoke to me I went up on the pile and I reached for the bale and as soon as I reached for the bale the one under my foot went. When he told me to go up on the pile I jumped up on the pile. I reached my hook out to get the bale to pull it in to me, — it was out, — and as soon as I put the hook on the bale to draw it in the other bales that I stood on went from my feet and the whole thing came on top of me. I jumped to dodge the bales and the top bale caught me in the ankle. . . . It broke a bone in the heel, somewhere." He further testified that he knew nothing about the condition of the pile before he went upon it. The bale upon which he stood and which was the first to give way was at the end of the third tier.

The verdict for the defendant was rightly ordered. The pile was not completed, but the workmen were still engaged in arranging the bales and the plaintiff knew it. He had been a freight handler for many years and was very familiar with the method of piling up bales of all kinds. The order was to go upon the pile and arrange one of the bales. It does not appear that the bale upon which the plaintiff stepped was regarded as finally placed. He might select his own way of getting upon the pile, and the order under the circumstances cannot be regarded as giving any assurance that the unfinished pile was secure. Indeed the order contemplated an act to make the pile secure. We see no negligence in the superintendent's giving the order, or in failing to warn the plaintiff, who was an experienced workman, of the unfinished state of the pile and the consequent danger in climbing upon it.

The case is to be distinguished from *Millard v. West End Street Railway*, 173 Mass. 512, and other similar cases cited by the plaintiff, and must be classed with cases like *Boisvert v. Ward*, 199 Mass. 594.

Exceptions overruled.

EMMA J. VARNEY vs. HARRY F. CURTIS & another.

Middlesex. November 11, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Conversion. Estoppel. Pledge. Words, "Conversion."

If one to whom bonds have been entrusted by their owner for safe keeping wrongfully pledges them as security for his own debt to a pledgee who has had notice of the rights of the owner, the taking of the bonds as such pledgee after such notice is an exercise of dominion over them which constitutes a conversion of the bonds as against their owner.

Where a woman entrusted to her son-in-law for safe keeping certain non-negotiable registered bonds and certain negotiable bonds, and the son-in-law, after forging indorsements upon the registered bonds, wrongfully pledged them and the negotiable bonds to secure his own debt, in an action against the pledgee by such owner of the bonds for their alleged conversion, it was *held*, that, even if the plaintiff had been careless in entrusting her bonds to the pledgor for safe keeping, which it did not appear that she was, this would not have helped the defendant, as the plaintiff owed him no duty to keep her securities carefully.

Where one to whom bonds have been entrusted by their owner for safe keeping wrongfully pledges them to a pledgee who has had no notice of the rights of the owner, if the pledgee on payment of his claim in good faith returns the bonds to the wrongful pledgor, he has committed no conversion; but if the pledgee by direction of the wrongful pledgor in good faith delivers the bonds to a third person as a new pledgee and takes from the new pledgee the amount of his claim which the bonds were pledged to him to secure, he has taken part in an act of dominion over the bonds for his own benefit, and the exercise of such dominion is a conversion for which he is liable to the owner of the bonds.

Explanation by LORING, J., of the use of the term "conversion" in actions of tort in the nature of trover.

LORING, J. This is an action for the conversion of six Northern Pacific Great Northern joint bonds (registered and non-negotiable), one Union Pacific bond (registered and non-negotiable), two Wolfeborough water bonds (negotiable coupon bonds) and one bond of the town of Wolfeborough (negotiable coupon bond), all, with the exception of the last (which was for \$200), being bonds for \$1,000. The case was tried before Justice Schofield without a jury. He found for the plaintiff, and the case is here on exceptions to his refusal to give seven rulings asked for by the defendant.

So far as now material the facts found by the judge were as follows: The plaintiff's husband died in February, 1902. Some

of the securities here in question came to her under her husband's will and some of them had been owned by her before his death. Soon after her husband's death these bonds were delivered by the plaintiff to her son-in-law, Symonds by name, a stock broker, to be kept by him for her in his safe deposit box. In April, 1902, the son-in-law opened an account with the defendants for the purchase and sale of stocks and bonds on margin and delivered to them as security for that account *inter alia* four of the plaintiff's Northern Pacific Great Northern joint bonds with forged indorsements. In the last part of January, 1904, Symonds directed the defendants to transfer this account to Colton and Company. Pursuant to that direction the defendants, on February 1, 1904, delivered to Colton and Company all the stocks and bonds which they were then carrying on margin for Symonds, and the bonds held by them as security for that margin account (including these four bonds), on receiving from Colton and Company \$10,515.54, the amount due to them from Symonds. In this connection the judge made the following finding and ruling: "The defendants in making delivery to E. S. Colton and Company knew that the bonds previously held by them as collateral would be held by Colton and Company as collateral, and intended that result. The court, in so far as it is a question of fact, finds as a fact, and in so far as it is a question of law, rules as matter of law, that such a delivery by the defendants was more than a mere transfer of physical possession of the bonds to Colton and Company, by order of Symonds. It was a transfer of possession of bonds which they held as collateral with the intention that the transferees should also hold them as collateral. The court also finds as a fact that the defendants were not obliged to make such a delivery in the performance of any duty which they owed to Symonds by contract as bailees or pledgees under him. They did it voluntarily in pursuance of his instructions and as the means of obtaining payment of the debt he owed to them. They had no knowledge or notice that the plaintiff was the true owner of the bonds, but the court rules that the act of delivery to Colton and Company with the intention above stated was an exercise of ownership, in exclusion of the rights of the true owner, an act of dominion, and a conversion."

On March 14, 1904, Symonds opened another margin account

with the defendants and deposited as security for that account another Union Pacific Great Northern joint registered bond belonging to the plaintiff, with a forged indorsement. A month and one half later, to wit, on April 30, he deposited two registered bonds with forged indorsements (the Union Pacific bond and a Northern Pacific Great Northern) and two coupon bonds (one Wolfeborough water bond, and one Wolfeborough town bond for \$200), and on May 2 he deposited with the defendants another Wolfeborough water bond (a coupon bond), all the property of the plaintiff. The judge found that by reason of what happened between March 14, when this account was opened, and April 30, on or after which day the securities last mentioned were deposited, the defendants took with notice all the bonds deposited as security for the second account except the non-negotiable Northern Pacific Great Northern bond deposited on March 14, and were not purchasers of those bonds in good faith.

On May 7 or 9, at Symonds's request, the defendants delivered to Berry and Company the securities then being carried by them in the second margin account and the bonds held as security for that account, and received from Berry and Company a check for \$11,237.13, the balance due from Symonds on that account. The judge ruled "that the act of the defendants in taking the bonds into their possession from Symonds with notice, intending to hold them as pledgees, was in itself an exercise of dominion over them in denial of the rights of the true owner, and a conversion," and made "the same findings of fact and rulings of law in regard to the two transfers of account." The judge found that Berry and Company became bankrupt and that the bonds received by Colton and Company were sold by them and no part of the proceeds came to the plaintiff. He found for the plaintiff for the sum of \$7,022.94, the value of the ten bonds after deducting the value of four bonds recovered from the assignees of Berry and Company. The only exceptions taken by the defendants were to the refusal of the judge to give the seven rulings asked for by them.

1. The first ruling asked for * could not have been given, because the judge found as a fact that all the bonds (except one)

* The first ruling asked for was in these words: "Upon all the evidence the plaintiff Emma J. Varney is not entitled to recover, and the verdict is to be for the defendants."

deposited with the defendants as security for the second account were taken by them with notice. There can be no question but that the judge was right in ruling "that the act of the defendants in taking the bonds into their possession from Symonds with notice, intending to hold them as pledgees, was in itself an exercise of dominion over them in denial of the rights of the true owner, and a conversion." There was evidence which amply warranted the judge in making the finding of fact that the defendants took these bonds with notice. Indeed the defendants have not argued that there was not. The exception to the refusal to give this ruling must be overruled.

2. The sixteenth ruling asked for * was rightly refused because: (first) as matter of law the judge was not bound to find (if indeed he could have found) that the plaintiff was careless in entrusting her bonds to Symonds for safe keeping; and (secondly) even if she was careless in so doing she would not have been negligent. She owed no duty to the defendants to keep her securities carefully, and so as against them she was not negligent if she kept them carelessly. An owner who keeps his securities in a careless manner does not lose his property in them nor his rights of action founded thereon. That was decided in *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516. It is to be borne in mind that these bonds were not indorsed by the plaintiff, as was the case in *Scollans v. Rollins*, 173 Mass. 275; *S. C.* 179 Mass. 346. Had the plaintiff entrusted these bonds to Symonds indorsed by her a different question would have been presented.

3. The twenty-first and twenty-second rulings asked for † are

* The sixteenth ruling asked for was in these words: "16. If the court finds upon all the evidence that the plaintiff entrusted the bonds in question or any of them to George E. Symonds and gave him full possession and control of the same, and the said George E. Symonds misappropriated the said bonds and gave them to the defendants as collateral security for certain purchases of stock, then the plaintiffs were negligent in their care of the said bonds and are estopped from claiming same or the value of the same from the defendants."

† The twenty-first and twenty-second rulings asked for were in these words: "21. The delivery of the bonds to Colton & Company by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff and for such bonds the plain-

based on *Loring v. Mulcahy*, 3 Allen, 575, and *Leonard v. Tidd*, 3 Met. 6, and the contention is that this case comes within those decisions.

It is settled that where a bailee receives on deposit goods from one in possession but without title to them, and afterwards restores them to the possession of the bailor in ignorance of the rights of the true owner, he is not guilty of a conversion. *Loring v. Mulcahy*, 3 Allen, 575. *Hill v. Hayes*, 38 Conn. 532. *Steele v. Marsicano*, 102 Cal. 666. *Nelson v. Iverson*, 17 Ala. 216. *Frome v. Dennis*, 16 Vroom, 515. For other cases where the temporary use of the property of another made by a defendant acting in good faith under a mistake of fact has been held or said not to be a conversion, see *Strickland v. Barrett*, 20 Pick. 415; *Wellington v. Wentworth*, 8 Met. 548; *Spooner v. Manchester*, 133 Mass. 270; *Shea v. Milford*, 145 Mass. 525; *Gurley v. Armstead*, 148 Mass. 267.

It is pointed out in *Pollock on Torts*, 374, in connection with this rule, that a bailee under those circumstances is estopped to deny the title of the bailor. That means that in returning the goods to the bailor the bailee does no more than perform the duty he owes to the bailor. He cannot be guilty of a conversion for doing that.

In *Leonard v. Tidd*, 3 Met. 6, this principle was applied in a case where the defendants acting in good faith received as security for a debt due to them from the pledgor a gun, the property of the plaintiff which was in the possession of the pledgor, and returned the property pledged to the wrongful pledgor upon payment of the debt due them from him. For a similar decision see *Spackman v. Foster*, 11 Q. B. D. 99. The reasoning on which the decision in *Spackman v. Foster* went was that although the pledgee in such a case claims to hold the property as against the wrongful pledgor until the debt due him from the wrongful pledgor is paid, so far

tiff is not entitled to recover, it being agreed that the bonds had not depreciated during the period that the defendants held the same.

"22. The delivery of the bonds to Berry and Company by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff and for such bonds the plaintiff is not entitled to recover, it being agreed that the bonds had not depreciated during the period that the defendants held the same."

as appears he does not claim to hold the property pledged as against the true owner. The same reasoning was adopted in *Loring v. Mulcahy*, *ubi supra*. That is to say, in such a case, so far as the true owner is concerned the pledgee is in possession under one to whom the true owner had given possession, and by returning the pledged property to the wrongful pledgor the pledgee does nothing more than perform the duty he owes the wrongful pledgor under the circumstances in effecting a restoration of the original *status in quo*, to wit, in putting back the property into the possession of the wrongful pledgor where originally it had been put by the true owner.

But in the case at bar the plaintiff's bonds, which the defendants received in good faith from Symonds in whose possession the plaintiff had put them, were not returned to Symonds. On the contrary they were delivered by Symonds's direction to persons who to the defendants' knowledge were lending money to Symonds on the security of the bonds. That is to say, the defendants in place of restoring the bonds to Symonds delivered them to a third person in obedience to a subsequent act on the part of Symonds which was an act of ownership and not of mere possession.

The question whether under those circumstances the pledgor is guilty of a conversion has not arisen in this Commonwealth. In *Leonard v. Tidd*, 3 Met. 6, the gun was not delivered by the pledgee to the purchaser from the wrongful pledgor. In that case the wrongful pledgor "took the gun from a room in the defendant's house, and delivered it to Pratt," the purchaser from the wrongful pledgor. See 3 Met. at p. 7. That is to say, the sale in that case was made by the wrongful pledgor and the gun was taken from the pledgee by the wrongful pledgor and delivered by him to the purchaser. All that the defendant did was to take the proceeds of the tortious sale. That is not a conversion. See *Polley v. Lenox Iron Works*, 2 Allen, 182. In *Parker v. Lombard*, 100 Mass. 405, there was no delivery by the bailee in obedience to a subsequent act of dominion exercised by the bailor. In that case the bailee delivered the goods to the person who was entitled to receive them under the instructions given him by the bailor when the original bailment was made. In other words, that was a case where the bailee delivered the goods to the person in whose behalf the bailee was told the bailment was made when it was made.

The authorities on this question outside of Massachusetts are in conflict.

Blackburn, J., in answering the question proposed to the judges by the House of Lords in *Hollins v. Fowler*, L. R. 7 H. L. 757, 767, gave it as his opinion that if the bailee in such a case "could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants [*i. e.* servants of the bailee] were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case." In the "present case" Blackburn, J.'s answer to the question put to the judges was that the defendant was guilty of a conversion. The decision in *Hudmon Brothers v. DuBose*, 85 Ala. 446, goes further. In *Hudmon Brothers v. DuBose* it was held that a warehouseman who delivered cotton stored with him not to the bailor but to the holder of the storage receipt issued to the bailor when the cotton was put in storage, was guilty of a conversion without its being shown that knowledge had been brought home to the warehouseman that more was being done than "merely changing the custody." Somerville, J., in delivering the opinion in that case, said that what may be for convenience called the rule of *Leonard v. Tidd* "does not include a restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach."

On the other hand a contrary conclusion was reached in *National Mercantile Bank v. Rymill*, 44 L. T. (N. S.) 767, and in *Leuthold v. Fairchild*, 35 Minn. 99. In *National Mercantile Bank v. Rymill*, an auctioneer who had received for sale from one in possession of the same, horses and a harness, delivered them to one who to his (the auctioneer's) knowledge had bought them of the bailor. In that case the auctioneer received the purchase money from the purchaser and after deducting his commission paid the balance to the bailor. In *Leuthold v. Fairchild*, a bank which had discounted a draft to which was attached a bill of lading for wheat shipped to the drawee delivered the bill of lading to the drawee on payment of the draft. The decision in *National Mercantile Bank v. Rymill*, 44 L. T. (N. S.) 767 (and not reported elsewhere) was a decision of the Court of Appeals made in 1881 by Bramwell,

Brett and Cotton, L. JJ. That case seems to have been argued by the plaintiff solely on the ground that it was governed by the decision in *Cochrane v. Rymill*, 40 L. T. R. (N. S.) 744, where the sale was made by an auctioneer who had made advances on the goods sold. The opinion of Blackburn, J., in *Hollins v. Fowler*, *ubi supra*, was not alluded to. Bramwell, L. J., in his opinion in *National Mercantile Bank v. Rymill*, puts as decisive of the case then to be decided the case of a thief who deposits a stolen portmanteau at the cloak room of a railway station and gets it back through an accomplice to whom he hands the ticket which he had received when the portmanteau was deposited. There is a later case to the same effect in England decided by Day, J., *Turner v. Hockey*, 56 L. J. (Q. B.) 301 (and not elsewhere reported). As to these two cases see *Consolidated Co. v. Curtis & Son*, [1892] 1 Q. B. 495, 501. The reasoning on which *Leuthold v. Fairchild* was decided is contained in this statement: "It [the bank] merely took a lien upon it to secure the drafts, and, when the lien was satisfied, surrendered the evidence and means of enforcing it to the persons indicated by Young. That was not an appropriation or assumption of such dominion over the wheat, to the exclusion of the real owner, as amounted to a conversion by it." It is apparent that the question on which the determination of these two cases depended was not considered.

We are of opinion that the defendants in the case at bar were not guilty of a conversion when they received in good faith the plaintiff's bonds (which they did receive in good faith) as security for the debts due them from Symonds. If they had returned the bonds to the possession of Symonds (with whom they originally found the bonds) on being paid by Symonds the debts due them from him, they would have done nothing more than perform the duty owed by them as pledgees to Symonds as pledgor in the absence of knowledge of the rights of Mrs. Varney, the true owner. But they did not return the bonds to the possession of Symonds, as they were bound to do in the absence of knowledge as to the true ownership, on being paid the debts due them from him. On the contrary under the direction of Symonds they delivered the bonds to persons who to their knowledge were lending to Symonds on the security of the bonds the amount owned them by Symonds. They knew that Symonds was exercising a subsequent

act of dominion over the bonds; they had an interest in having that act of dominion carried through; and they aided Symonds in carrying through that act of dominion by delivering the bonds to Colton and Company and Berry and Company in order to secure payment in that way of the debts owed them by Symonds. The subsequent act of dominion was a conversion, and in that conversion the defendants participated for the purpose of forwarding their own interests. The case therefore is not only a stronger case than *Hudmon Brothers v. DuBose*, 85 Ala. 446, where the defendant had no knowledge and no interest, but it is a stronger case than the case put by Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757, where the defendants had knowledge but no interest. It is also a stronger case than the case of *Hiort v. Bott*, L. R. 9 Ex. 86. In that case one Grimmett, to defraud the plaintiff of certain barley, professed to buy it on behalf of the defendant, to whom by Grimmett's direction it was shipped, deliverable to consignor or consignee. After the barley had arrived at its destination, Grimmett procured an order for its delivery from the defendant on the plea that it was sent to him by mistake and that such an order would cure the mistake. This was held to be a conversion on the ground that it was an unauthorized act by which the plaintiff lost the barley. In the words of Bramwell, B., "This was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiff of them." For a similar decision see *Knapp v. Guyer*, 75 N. H. 397. In the case at bar the defendants, by an unauthorized act, undertook to control the disposition of the plaintiff's bonds and delivered them to persons who deprived the plaintiff of her property. That makes them guilty of a conversion of them.

It is not out of place to point out again what before now has been said several times (see for example Martin, B., in *Burroughes v. Bayne*, 5 H. & N. 296; Bramwell, B., in *Hiort v. Bott*, L. R. 9 Ex. 86, 90), namely, that the terms "conversion" and "converting to his own use" are misleading and unfortunate terms. As was said by Collins, J., in *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495, 498, "The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (per Martin, B., in *Burroughes v. Bayne*, 5 H. & N. at p. 301, and per

Lord Mansfield, C. J., in *Cooper v. Chitty*, 1 Burr. at p. 31), and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it." It was from this allegation of a fictitious finding by the defendant that the action got its name of trover. 3 Bl. Com. 152, 153. The declaration in trover and conversion alleged the ownership of the plaintiff, a "casual" loss by him and a finding by the defendant. It then alleged that after thus coming lawfully into possession of the goods the defendant "converted and disposed of the said chattels to his own use." See for example 2 Chitty, Pl. (2d London ed.) 371, 372. It might perhaps have been better if the terms "conversion" and "converted to his own use," which were brought in by the allegation of a fictitious loss and finding, had been given up when that allegation was given up, and a plainer statement of a tortious act on the part of the defendant by which the plaintiff lost his goods had been substituted.

We are of opinion that the delivery of the bonds to Colton and Company and to Berry and Company were not "equivalent to a return of the said bonds to George E. Symonds," and the twenty-first and twenty-second rulings asked for were properly refused.

4. No argument either at the bar or on the brief has been made in support of the three other rulings asked for. The defendants however have contended that they should have been given. Under these circumstances it is enough to say that we find that no error was committed by the judge in refusing to adopt them.

5. The defendants have argued some points of law not raised by the rulings asked for. For that reason we have not discussed them. It is not improper to add that we should have found that no error had been committed by the judge had the questions argued been raised.

Exceptions overruled.

H. H. Bond, for the defendants.

G. L. Mayberry, for the plaintiff.

FOSTER, HALL AND ADAMS COMPANY vs. FREDERICK C. SAYLES.

Suffolk. November 12, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach. Mortgage, Of real estate: foreclosure.

In an action for money had and received to recover the amount of a deposit made at an auction sale at which the plaintiff was declared to be the purchaser of certain real estate under an agreement that if the title was not good there would be no sale and the money would be refunded, in accordance with the established law of this Commonwealth as to what constitutes a good title the plaintiff must prove that the title offered by the defendant was not good beyond such a reasonable doubt as would cause a prudent man to pause and hesitate before investing his money.

In an action to recover the amount of a deposit which was paid upon a purchase of real estate at auction and was to be returned if the title to the real estate was not good, where the title offered by the defendant was derived from a foreclosure sale under a mortgage and the plaintiff contends that such title was not good, either because it was a matter of doubt whether the foreclosure sale was in accordance with the terms of the power of sale in the mortgage, or because it was a matter of doubt whether the mortgage foreclosed had not been discharged before the foreclosure sale, the question whether either of these doubts was well founded cannot be determined finally in the absence of the parties interested, and the question to be passed upon is whether the title offered by the defendant was so doubtful that no one should be compelled to take it or be held to have been wrong in refusing to take it.

In an action to recover the amount of a deposit paid upon a purchase of real estate on the ground that the title to the real estate offered by the defendant was not good, where the title offered by the defendant was derived from a foreclosure sale under a mortgage and the plaintiff contended that it was a matter of doubt whether the foreclosure sale complied with the terms of the mortgage because it did not appear that thirty days' written notice had been given of default as alleged to have been required by the mortgage, the defendant contended that such a notice was not required and that the giving of such a notice would have been futile. It appeared that the mortgage had been given to secure the payment of certain bonds, that an article of the mortgage provided that, in case of a default or of a failure to perform the requirements of the mortgage, which should continue for thirty days after written notice thereof had been given by the trustee under the mortgage to the company issuing the bonds, the principal of the bonds at the election of the trustee should become due unless such default or failure was waived by a majority of the bondholders, and that a subsequent article of the mortgage, which created the power of sale, provided that "in case of default or failure as aforesaid" the trustee might sell the mortgaged property. The foreclosure sale took place nearly five years after the maturity of the bonds secured by the mortgage. *Held*, that it was at least a matter of

doubt whether thirty days' written notice of a default was not required by the terms of the mortgage although the bonds were overdue, and that, if it was a fact that a written notice of default would have served no useful purpose, such fact would not dispense with the necessity of giving such a notice if it was required by the terms of the power of sale.

In an action to recover the amount of a deposit paid upon a purchase of real estate on the ground that the title to the real estate offered by the defendant was not good, where the title offered by the defendant was derived from a foreclosure sale and the plaintiff contended that it was a matter of doubt whether the mortgage foreclosed had not been discharged before the foreclosure, it appeared that three and a half years before the foreclosure sale the defendant, who was the owner of all the bonds secured by the mortgage, in the belief that he also was the owner of the equity of redemption of the mortgaged property, requested and obtained from the trustee under the mortgage a deed reciting these facts and purporting to "cancel and discharge the mortgage" and to "release and quitclaim" to the defendant, his heirs and assigns the property conveyed by the mortgage. Just before the publication of notice of the foreclosure sale the defendant executed and delivered to the trustee a paper, reciting that the deed of release above described was void because the defendant was not as he erroneously had supposed the owner of the equity of redemption, disclaiming all rights under such deed and assigning all rights acquired under it to the trustee. *Held*, that, in the absence of the persons who were the owners of the equity of redemption, it could not be adjudged that it was free from doubt that the deed purporting to discharge the mortgage did not discharge it as to the defendant. One, who has agreed to purchase certain real estate if the title is good, is not bound to take a doubtful title merely because from a commercial point of view it might be thought that his title would not be likely to be disturbed.

CONTRACT for money had and received amounting to \$5,072.39 according to an account annexed. Writ dated February 13, 1907.

In the Superior Court the case was tried before *McLaughlin*, J., without a jury. It appeared that the money sought to be recovered was deposited by the plaintiff as a part payment on account of the purchase of certain lots of real estate which the defendant caused to be sold at auction on June 8, 1904, and that before the sale the auctioneer, after reading the conditions of the sale, stated in the presence of the defendant that "if the title [to the real estate] was not a good title there would be no sale and the money would be refunded." The material facts shown by the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule that on the facts shown the title tendered by the defendant to the plaintiff was a good and marketable title. The judge refused to make this ruling. The defendant also asked the judge to rule that the plaintiff was not entitled to recover. The judge declined so to rule, and ruled that

the title tendered by the defendant was defective and that the plaintiff therefore was excused from the performance of its contract to purchase. He found for the plaintiff in the sum of \$5,502.15; and the defendant alleged exceptions.

G. W. Anderson, for the defendant.

G. L. Mayberry, for the plaintiff.

LORING, J. The only question presented in this case is whether the title offered by the defendant to the plaintiff was "a good title" which it was bound to accept.

The statement of what a good title consists in has been usually made in suits brought by a vendor to compel specific performance of a contract of sale. But the question is the same in an action at law founded on the fact that the title offered by the vendor was not a good one and an action is brought by the vendee to recover back a deposit which has to be returned if the title was not a good title. The requisites of a good title were well stated by Devens, J., in *First African Methodist Episcopal Society v. Brown*, 147 Mass. 296, 298: "The general rule is well settled, that, in order to maintain a bill for specific performance of a purchase of land, the plaintiff must show that the title tendered by him is good beyond reasonable doubt. But a doubt must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made." That was then and is now the settled law of the Commonwealth. See *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400, and cases cited; *Conley v. Finn*, 171 Mass. 70; *Martin v. Hamlin*, 176 Mass. 180; *Close v. Martin*, 208 Mass. 236.

The title offered by the defendant in the case at bar came from a foreclosure sale of a mortgage executed on February 18, 1896, by the Massachusetts Car Company to T. Quincy Browne, Trustee, to secure an issue of bonds amounting to \$120,000, which fell due on January 22, 1898. The foreclosure sale took place on December 15, 1902, and the property was then bid in by and conveyed to the defendant. The plaintiff's objections to the

title were twofold. First, that it was a matter of doubt whether the foreclosure sale was made in accordance with the power of sale contained in the mortgage; second, that it was also a matter of doubt whether the mortgage foreclosed had not been discharged before the foreclosure sale took place. In the absence of the parties interested in those questions a final determination cannot be made upon them, as was done in *Chesman v. Cummings*, 142 Mass. 65, where all parties interested were before the court. The question is not whether the plaintiff is right in its objections, but whether, in view of these objections the title offered by the defendant was so doubtful that no one should be compelled to take it or be held to have been wrong in refusing to take it. *Martin v. Hamlin*, 176 Mass. 180.

1. We are of opinion that for lack of a thirty days' written notice of default it was at least doubtful whether the foreclosure sale was made in accordance with the power of sale given in the mortgage to the trustee. The mortgagee's affidavit of sale did not state that such a notice was given and the defendant did not offer the plaintiff any sufficient evidence that it was given. His contention is that such a notice was not necessary, at any rate under the circumstances of this case, which are as follows: By the seventh article of the mortgage it is provided that: "In case any default shall be made by the Company in the payment of said bonds issued hereunder or of any of them when they fall due and payable or in the payment of any installments of interest on any of the said bonds, or in case the Company shall fail faithfully to observe and perform any of the requirements made of it by these presents or by said bonds and such default or failure shall continue for the space of thirty days after written notice thereof has been given by the Trustee to the Company," then the principal of the bonds shall at the election of the trustee become due unless such default or failure is waived by a majority of the bondholders. By the eighth article it is provided that: "In case of default or failure as aforesaid," the trustee may take possession of the mortgaged premises and carry on the business of the mortgagor. Then follows the ninth article which creates the power of sale about the execution of which in the case at bar (it is the defendant's contention) there is reasonable doubt. The ninth article begins in these words: "In case of default or failure as aforesaid," the trustee in

place of taking possession as provided above, may sell etc. The defendant now contends that "default or failure as aforesaid" in the eighth and ninth articles does not refer to a default or failure which continues for thirty days after written notice thereof as provided in the seventh article because: (first) the thirty days' written notice provided for by the seventh article was to be given in order to enable the trustee to declare the bonds due before their maturity and at the time of the foreclosure here in question the bonds were overdue; and (second) it is provided in the condition of the mortgage that the mortgagor shall have possession "until default" and the first article is a covenant to pay the bonds as they mature. And (thirdly) because under the circumstances the giving of such a notice in the case at bar would have been futile.

We take these up in their order. (1) Although it is not plain why it was thought wise to provide that a thirty days' written notice of "default or failure" should be given if the bonds were overdue, yet it is at least a matter of doubt whether that is not what this article of the mortgage required. The provision "in case of default or failure as aforesaid" in the eighth article would seem to refer to the default or failure described in the preceding seventh article, and the same words in the ninth (the article here in question) must have the same meaning there that they have in the eighth. (2) The suggestion that "in case of default or failure as aforesaid" in the ninth article refers to the default in payment only and not to a default in payment or a failure to perform any other duty owed by the mortgagor is answered by the terms of the provision. (3) The peculiar circumstances of this case as to service of the notice relied on by the defendant are these: The owner of the equity of redemption at the time of the foreclosure sale was the Ashburnham Manufacturing Company, a West Virginia corporation. This foreign corporation had appointed the commissioner of corporations its agent to accept service, and had notified him to send notice of service to the defendant. The fact, if it was a fact, that the written notice which by the terms of the power of sale had to be given, would not have served any useful purpose, is not an answer to the objection that the power was not duly complied with. More than that, it will appear later on that there was reason to believe that there had been a dispute as to

whether the defendant or the Ashburnham Manufacturing Company owned the equity of redemption. Under those circumstances, if the written notice of "default or failure" (which for the purposes of this argument the defendant must admit was a pre-requisite to a valid execution of the power of sale) was to be handed to the defendant as the representative of the Ashburnham Manufacturing Company claiming to own the equity of redemption, it was his duty (and all the more his duty because he owned all the mortgage bonds) to see to it that it reached those who were interested in protecting the rights of the Ashburnham Manufacturing Company as the possible owner of the equity of redemption. We are of opinion that the first objection taken by the plaintiff to the title offered it by the defendant was well taken.

2. We proceed to the consideration of the plaintiff's other objection, namely, that it was a matter of doubt whether the mortgage had not been discharged by the mortgagee before the foreclosure sale took place. The facts are these: On May 8, 1899, Browne, the trustee under the mortgage, executed and delivered to the defendant a deed by which, after reciting the execution of the mortgage, and the facts that the defendant was the owner of all the bonds and had requested Browne "to cancel and discharge said mortgage and release and quitclaim said property," stated that Browne did "cancel and discharge the mortgage" and did "release and quitclaim" unto the defendant, his heirs and assigns, "the property thereby conveyed." Three and one half years later (in November, 1902, just before the first publication of notice of the foreclosure sale here in question), the defendant executed and delivered to Browne a paper by which, after reciting the execution of the mortgage and of the discharge and release just referred to, and after reciting the further fact that the discharge and release were executed and taken in the belief that the defendant "was the owner absolutely and in fee simple, subject to said mortgage, of the property therein described," but that the defendant "did not own the equity of redemption as believed, and was, and is now, the owner of the bonds secured by said mortgage, which bonds have not been in any part paid," and after reciting further that the defendant is advised by counsel that the instrument executed by Browne is void as a discharge and inoperative to assign the mortgage to

the defendant, thereupon the defendant disclaimed all right under the discharge and assigned all rights acquired under it to Browne. It appears by the second of these two papers that the first (the cancellation and discharge of the mortgage) was made because the defendant then believed that he owned the equity of redemption. It may well be that under these circumstances the first deed which conveyed the premises to the defendant free of the incumbrance of this mortgage would be construed to be a conveyance to him as owner of the equity of redemption. And in our opinion it is not altogether clear that a deed which is intended to be a cancellation and discharge of a mortgage coupled with a conveyance of the mortgaged property to one claiming to own the equity of redemption will operate as an assignment of the mortgage on the grantee's changing his mind and determining to abandon his claim to be the owner of the equity. Or rather that proposition is not so clear that we can adjudge that to be the legal result in the absence of those who as it turned out were the owners of the equity of redemption.

3. It was said orally at the argument that the title was sufficiently good to require the plaintiff to take it because the bonds which the mortgage secured amounted to \$120,000 and the whole property (of which the plaintiff bought eight of fourteen lots) sold at the auction for \$13,632.50. Apart from other objections to that argument, it is one founded upon considerations which cannot be entertained in this proceeding. The plaintiff was entitled to a good title as defined in our decisions, and not to one with respect to which from a commercial point of view it might be thought not to be likely that he would be troubled.

Exceptions overruled.

HARRY D. HALL & another vs. RUSSELL D. CRANE.

Suffolk. November 12, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bills and Notes. Waiver.

A waiver by the indorser of a promissory note of demand upon the maker is not a waiver of notice of the maker's default.

CONTRACT by the holder of five promissory notes against the indorser of the notes who was the payee. Writ in the Third District Court of Eastern Middlesex, dated November 23, 1910.

On appeal to the Superior Court the case was submitted to *Fessenden, J.*, upon an agreed statement of facts, by which it appeared that the defendant at the time he indorsed the notes waived demand on the maker of the notes at maturity by writing above his signature the words: "Waive demand," but that he did not either in writing or orally waive notice to him of the failure of the maker to pay the notes at maturity unless his waiver of demand was also a waiver of notice. It further was agreed that no seasonable notice was given to the defendant of the maker's failure to pay the notes at maturity, that the notes were not paid at maturity and that they still remained unpaid. It was agreed that, if the defendant by his waiver of demand waived notice, judgment was to be entered for the plaintiffs in the sum of \$90 with interest from the date of the writ and costs; and that, if the defendant did not so waive notice, judgment was to be entered for the defendant.

The judge ordered judgment for the defendant; and from the judgment entered in accordance with that order the plaintiffs appealed.

The case was submitted on briefs.

J. F. Lynch, for the plaintiffs.

H. F. R. Dolan & J. H. Morson, for the defendant.

HAMMOND, J. At the time of the indorsement the defendant made a written waiver of demand; and the only question is whether as matter of law that was a waiver of notice. Plainly it was not.

The liability of an indorser is conditional, the conditions being first, that at the maturity of the note there shall be a demand upon the maker for payment, and second, that if the note be not then paid due notice thereof shall be given to the indorser. And these two conditions are distinct and independent of each other. Either can be waived and the other insisted upon. Neither upon principle nor by the great weight of authority is a waiver of one without more a waiver of the other as matter of law. *Berkshire Bank v. Jones*, 6 Mass. 524. R. L. c. 73, § 106. *Drinkwater v. Tebbetts*, 17 Maine, 16. *Burnham v. Webster*, 17 Maine, 50. Danl. Neg. Instr. (5th ed.) § 1098. See also *Low v. Howard*, 11 Cush. 268, and *Parks v. Smith*, 155 Mass. 26, and cases cited.

Judgment for the defendant.



ABBIE I. THEALL vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 12, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Boston Elevated Railway Company. Boston Transit Commission. Negligence, In subway, In use of escalator.

At the trial of an action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, there was evidence tending to show that the accident was the first of its kind that had happened, and that it was due to the fact that the type of escalator used was unsafe and dangerous. It appeared that the escalator was constructed by the Boston Transit Commission under the provisions of St. 1902, c. 534, and that before its completion the agreement provided for in § 10 of that statute had been made for a lease of the tunnel to the defendant. The chief engineer of the commission testified that before the type of escalator in question was adopted the commission had consulted with the defendant who had assented to its use. The plaintiff offered to show that there was another type of escalator which did not have the unsafe features of the one upon which her injuries were received. The trial judge excluded the evidence and ordered a verdict for the defendant. *Held*, that the action of the judge was proper, as there was no evidence that the defendant was responsible for the adoption or use of the escalator in question.

TORT for personal injuries, received while using an escalator in the State Street station of the Washington Street tunnel in

Boston and alleged to have been caused because the escalator was "an unsafe and dangerous appliance or contrivance." Writ dated July 8, 1909.

In the Superior Court the case was tried before *Fessenden, J.* It appeared that the escalator in question was of a type called the "Reno." After having offered evidence tending to show that it was by nature unsafe and dangerous, the plaintiff offered to show that there was another type of moving stairway in use which was free from the objectionable features which, she contended, the "Reno" had. The evidence was excluded subject to an exception by the plaintiff. Other facts are stated in the opinion. The Carson there referred to was Howard A. Carson, chief engineer of the Boston Transit Commission. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. E. Buffum, for the plaintiff.

F. M. Ives, for the defendant.

LORING, J. The injury here complained of happened as the plaintiff reached the top of an escalator or moving stairway, part of the State Street station of the Washington Street tunnel, and was caused by the mechanism of the escalator. The defendant introduced evidence that the Washington Street tunnel, including this escalator or moving stairway, was the property of the city of Boston, constructed by the Boston Transit Commission under St. 1902, c. 534, and leased to the defendant railway company under § 10 of that act. Section 10 of that act (St. 1902, c. 534) provided that the transit commission should make a contract with the defendant railway for the lease of the subway within ninety days of the passage of the act, and the act was not to take effect unless adopted by the citizens of Boston, after such a contract of lease had been made with the defendant railway. The defendant further offered evidence that under the lease it had no right without leave from the transit commission to make any change in the tunnel, including the escalator. When the evidence or nearly all the evidence was in, the presiding judge asked the counsel for the plaintiff if he now questioned the fact that the escalator had been installed by the commission and that the defendant had nothing to do with the installation of it. To which the counsel answered that he did not dispute that except for the further ques-

tion raised by the testimony of Mr. Carson. On cross-examination Carson had testified that the transit commission had consulted with the officials of the defendant railway and that they assented to the type of escalator which was adopted by the transit commission, and that the defendant railway never had asked to have the escalator changed.

The contract for a lease of the Washington Street tunnel had to be made by the defendant railway before the act authorizing the construction of it was submitted to the voters of Boston for adoption or rejection. In other words the lease taken by the defendant was a lease of a tunnel thereafter to be constructed not by them but by the transit commission. It follows that if there was negligence in adopting the kind of escalator which was adopted, it was not the negligence of the defendant railway but of the transit commission who had sole and final control of the matter. There was no negligence on the part of the defendant railway in not asking the transit commission to make a change in the escalator, for it appeared that this was the first accident that had happened. Carson's testimony that the officials of the railway had been consulted as to the adoption of this type of escalator did not give rise to any question of fact. It is plain that what the transit commission did was an act of courtesy and that they did not share or delegate the power and the consequent responsibility committed to and put upon them by St. 1902, c. 534. Under these circumstances, even if there was negligence in adopting the type of escalator adopted, it was not the defendant's negligence. See in this connection *Falkins v. Boston Elevated Railway*, 188 Mass. 153; *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14; *Anshen v. Boston Elevated Railway*, 205 Mass. 32. In such a case the rule has no application, that one who having the choice of selection voluntarily uses the property of another in his business makes it his for the purpose of that business, as was laid down in *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341, at p. 350, and in the other cases cited by the plaintiff.

It follows that there was no error in excluding evidence that there were other types of escalators. We do not intimate that had it not been for this that evidence would have been admissible.

Exceptions overruled.

J. HOMER PIERCE vs. DUDLEY TALBOT & another.

Suffolk. November 13, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bills and Notes, Non-negotiable, Attested. Assignment. Practice, Civil, Parties. Limitations, Statute of.

A promissory note, secured by a mortgage, is not negotiable if it is payable in three years from its date "with the privilege of anticipating payment upon said sum in whole or in part at any time."

One who receives from the holder an attested overdue non-negotiable promissory note, bearing an indorsement making it payable to the order of such recipient, takes it as an assignee and may bring an action against its maker for his own benefit in the name of the payee, although the payee forbids him to do so; and such an action, under the provisions of R. L. c. 202, § 1, cl. 3, is not barred if it is brought within twenty years from the date when the note became due.

CONTRACT for a balance alleged to be due on the promissory note hereinafter described. Writ dated December 31, 1908.

In the writ it was stated that the action was brought by "J. Homer Pierce . . . for the benefit and use of Winfield Temple . . . the holder and owner of the note that is the subject matter of this action."

In the Superior Court the case was heard by *Raymond, J.*, upon an agreed statement of facts.

The note was as follows:

"\$700-00/100

Boston Nov 13th 1893

For value received, we—Promise to pay to J. Homer Pierce or order the sum of Seven hundred Dollars 00/100 in three years from this date, with interest to be paid semi-annually, at the rate of six per centum per annum, during said term, and for such further time as the said principal sum or any part thereof, shall remain unpaid with the privilege of anticipating payment upon said sum in whole or in part at any time.

Signed in the presence of

Robert M. French

Dudley Talbot

Jonathan B. L. Bartlett

Secured by Mortgage of Real Estate
in Boston to be recorded in Suffolk
Registry of Deeds."

From the agreed statement of facts it appeared that on September 29, 1904, J. Homer Pierce assigned the mortgage "and indorsed the note" to John L. Stone, who on November 24, 1908, assigned the mortgage "and indorsed" the note to Winfield Temple "for the purpose of foreclosing the mortgage." Both indorsements were in the form, "Pay to the order of" the person to whom the note was transferred, "without recourse to me."

On March 23, 1909, J. Homer Pierce wrote to Temple's attorneys stating that, as he had no claim against the signers of the note, he had not authorized and did not authorize any party to bring suit against them in his name, and that he objected to such action.

The judge found for the plaintiff in the sum of \$376.60; and the defendants appealed.

The case was submitted on briefs:

I. C. Hersey, for the defendants.

G. S. Littlefield & C. S. Tilden, for the plaintiff.

HAMMOND, J. This is an action upon a witnessed promissory note, brought in the name of the original payee for the benefit of the holder, more than six years and less than twenty after the cause of action accrued. The sole defense is the statute of limitations (R. L. c. 202, § 1, cl. 3, and § 2), and the only question raised under that defense is whether the facts that the action was brought without the consent or knowledge of the payee and is now carried on against his will are fatal to it.

No discussion is necessary. The ground is covered by previous decisions of this court. The note is not negotiable. *Stults v. Silva*, 119 Mass. 137. Such a note is nevertheless within R. L. c. 202, § 1, cl. 3; *Sibley v. Phelps*, 6 Cush. 172; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21; and the time of limitation is twenty years. The note not being negotiable Temple holds it not as indorsee but as assignee. The respective rights of such holders are set out in *Mosher v. Allen*, 16 Mass. 451, 452, as follows: "If the payee of a promissory note, not negotiable, puts his name on the back thereof, intending to transfer it, he authorizes the prosecution of a suit in his name; for there is no other way of making the assignment effectual. But not so when the payee of a negotiable note indorses it; for that act transfers the property and the right of action, and is an assignment in law by the statute

of Anne.* The payee in such case has lost all property in the note, and all control over it. Certainly, without his consent, no action can be maintained upon it in his name." Inasmuch as the present action was brought for the benefit of an assignee, it was properly brought and can be maintained irrespective of the payee's consent. See *Troeder v. Hyams*, 153 Mass. 536, and cases cited.

Judgment affirmed.

JOSEPH A. FRANCIS, administrator, vs. ALDEN ROUNSEVILLE, Jr.

Plymouth. November 13, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, Causing death, In a mill.

At the trial of an action by an administrator for the conscious suffering and death of his intestate while he was employed in a saw mill, the plaintiff in his opening statement to the jury offered to prove merely that his intestate when injured was nineteen years of age and of no experience, that he was last seen going alone into a room in the basement of the mill lighted only by a single window so covered with dirt as to make it impossible to work there without a lantern; that he was heard to say just before he entered the room, "I have been looking for it and I can't find it," or "I have been looking for it, but I will find it," and to say to the engineer, "Get out of my way; I am in a hurry;" that later his body was found under circumstances which showed that his clothing had been caught on some shafting and that he had been thrown about until he was killed; and that there was near at hand a block of wood upon which he might have stumbled. The judge at the close of the opening statement ordered a verdict for the defendant. *Held*, that the action of the judge was right, as there was no evidence offered tending to show that the intestate in the course of his employment had need to go into the room where he was killed or that his employer had sent him there, so that the defendant owed the intestate no duty to warn him in regard to the conditions in the room.

TORT for the conscious suffering and death of one Joseph H. Francis while in the defendant's employ. Writ dated August 31, 1910.

In the Superior Court, *Hardy*, J., at the close of the opening statement of the plaintiff, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

* The statute of Anne referred to is St. 3 & 4 Anne, c. 9.

The material facts are stated in the opinion.

The case was submitted on briefs.

M. R. Hitch, for the plaintiff.

F. S. Hall & F. M. Sparrow, for the defendant.

LORING, J. In this case there was no evidence of negligence on the part of the defendant. The plaintiff's intestate, an employee of the defendant, was seen going alone into some room beyond the "fire room" in the cellar of the defendant's sawmill. As he went into the fire room he "was heard to say, 'I have been looking for it and I can't find it' or 'I have been looking for it, but I will find it.'" In passing through the fire room "he was heard to say to the engineer, 'Get out of my way; I am in a hurry.'" Shortly afterwards the machinery of the mill stopped, and the plaintiff's intestate was found dead, caught on the shafting near the coupling, under circumstances showing that he had been caught by his trousers and had been thrown about the shafting until he was killed. There was a block or log on the floor near to the coupling over which the plaintiff's intestate might have stumbled in the darkness." It is stated in the bill of exceptions in addition to the above, that the plaintiff's intestate was nineteen years of age and had no knowledge or experience with the machinery of the defendant. And, as we understand the bill of exceptions, the room in which the plaintiff's intestate was killed "was lighted by one window only, which at the time of the injury had been allowed to be covered with dirt and debris so that the room was so dark that it would be impossible to work in the same without the aid of lanterns." There was no suggestion that there had been any change in the condition of the premises since the plaintiff entered the defendant's employ.

On this state of facts we see no evidence which would warrant a finding of negligence on the part of the defendant. The darkness of the room in which the plaintiff's intestate was killed, or the block or log near the coupling, or the two in combination are the only matters on which that could be based. Without considering other difficulties in the way of making out negligence on the defendant's part based on these matters, it is enough to say that there was no evidence that the plaintiff's intestate had occasion to go into the room where he was killed in the course of his employment, or that he was sent there by the defendant on the occasion

when he was killed. Consequently there was no duty on the defendant to give the intestate warning of the conditions there existing. *Ojala v. American Steel & Wire Co.*, ante, 116. See also in this connection *Casey v. New York, New Haven, & Hartford Railroad*, 207 Mass. 443; *Lydon v. Edison Electric Illuminating Co.* 209 Mass. 529; *MacDonald v. Edison Electric Illuminating Co.* 208 Mass. 199.

Exceptions overruled.

ABRAHAM LEVY vs. EVELYN DOWNING.

Middlesex. November 13, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Marriage and Divorce. Superior Court.

Where a statute of another State provides that "any marriage contracted by a person below the age of consent . . . may in the discretion of" a certain court of that State "be annulled at the suit of the party who at the time of contracting such marriage was below the age of consent," a marriage contracted in that State between parties, one of whom was below the age of consent, if it is not in violation of R. L. c. 151, §§ 1-5, is valid here until it has been annulled by the State where it was solemnized, and the Superior Court of this Commonwealth has no jurisdiction of a petition for annulment of such a marriage.

PETITION filed on September 13, 1911, for annulment of marriage.

In the Superior Court the case was heard by *Dana, J.* It appeared that the petitioner and the respondent, for the purpose of evading the marriage laws of this Commonwealth (not including, however, any of the provisions of R. L. c. 151, §§ 1-5), proceeded to Nashua in the State of New Hampshire, and there applied for a license to marry, both parties making false statements of their ages for the purpose of inducing the city clerk to issue to them the marriage license required by the laws of the State of New Hampshire; that on the same day, after obtaining such a license, they were joined in marriage at Nashua by a justice of the peace authorized to solemnize marriages, and returned to this Commonwealth to their respective homes; that the petitioner at the date of the marriage was under the age of eighteen years,

and the respondent was of about the same age; that the marriage was without the consent of the parents of either party, that the parents were living in this Commonwealth, had custody of the parties to the marriage as minors, and were competent to act; that the parties had at no time cohabited, and that neither of them at any time had confirmed the marriage.

The statute of New Hampshire applicable to the case is quoted in the opinion.

The judge ruled that as a matter of law the Superior Court was without jurisdiction of the case and ordered that the petition be dismissed. At the request of the petitioner he reported the case for determination by this court.

W. Charak, for the petitioner.

No counsel appeared for the respondent.

HAMMOND, J. "That a marriage, valid by the laws of the place where it is celebrated, is valid in this State, on grounds of public policy, though the parties went into another State merely to evade the laws of the State, is established in the cases of *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Sutton v. Warren*, 10 Met. 451." Dewey, J., in *Commonwealth v. Hunt*, 4 Cush. 49. See also *Commonwealth v. Lane*, 113 Mass. 458, and cases therein cited for a general discussion of the subject. By statute in this Commonwealth certain cases have been freed from the operation of this rule, and in those specified cases the marriage is void in this Commonwealth, "if the parties, both being resident here and intending to return and reside here," go into a foreign State in order to evade the provisions of our statute, "and there have the marriage solemnized, and return and reside here." R. L. c. 151, §§ 1-5, both inclusive, and § 10. The present case does not come within these statutes, and therefore is governed by the general law.

The question of the validity of the marriage must be decided by the law of New Hampshire. In the absence of proof to the contrary the common law of that State must be regarded as the same as in this State. The only statute of that State material to this inquiry is St. 1907, c. 80, § 2, which is as follows: "The age of consent shall be in the male eighteen years and in the female sixteen years. Any marriage contracted by a person below the age of consent" with certain exceptions not here material, "may in the

discretion of the Superior Court be annulled at the suit of the party who at the time of contracting such marriage was below the age of consent, unless such party after arriving at such age shall have confirmed the marriage." Under that law this marriage was solemnized, and by that law must the question of its validity be determined. It is plain that under it the marriage is not void, but must stand until and unless the Superior Court of that State in the exercise of its discretion sees fit to annul it. The Superior Court of this State rightly held that it had not the power to grant to the petitioner the relief prayed for.

Petition dismissed without prejudice.

WILLIAM E. NEAL, receiver, vs. FRANK E. WILSON.

Suffolk. November 13, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bills and Notes, Accommodation.

Where, at the solicitation of the cashier of a bank and for the purpose of making good an overdraft by a customer of the bank, a third person without receiving any consideration delivers to the cashier, who knows of such lack of consideration, his check drawn upon a second bank, payable to his own order and indorsed by him to be deposited to the credit of the overdrawn account, the first bank is not a party accommodated and can recover from the drawer of the check under R. L. c. 73, § 46.

CONTRACT by the receiver of the American National Bank of Boston against the drawer of a check for \$250 upon the State National Bank of Boston, payable to the drawer's order and indorsed by him. Writ in the Municipal Court of the City of Boston dated July 20, 1910.

On appeal to the Superior Court the case was tried before *Hitchcock, J.* The facts are stated in the opinion. There was a verdict for the plaintiff; and the defendant alleged exceptions.

F. G. Woodbury, (J. M. Marden with him,) for the defendant.

C. F. Eldredge, for the plaintiff.

LORING, J. This was an action by the receiver of the American National Bank against the drawer of a check which on present-

ment had been dishonored by the drawee. On the day on which the check was drawn the defendant went to the bank with one Craig, who admittedly was a clerk of one Pearson. The defendant testified that the cashier of the bank told him (the defendant) that Pearson's account with the bank was overdrawn to the amount of \$250; that Pearson was in New Hampshire and "it was along about halfpast one or quarter of two;" and that "he had spoken to Mr. Craig about having me put up a check of \$250 to close the overdraft, and he said if I would do this, that he would hold me harmless and return the check to me in a day or two, as soon as Pearson arrived in town;" that he (the defendant) thereupon drew the check here sued on and handed it to the cashier of the bank. On cross-examination the defendant testified that he knew that the check was to be deposited to the credit of Pearson's account with the bank to make that account whole. Although it does not affirmatively appear in the bill of exceptions, it was stated at the argument that the jury were instructed that if the cashier did agree to hold the defendant harmless, as he testified, it was a defense. As to this defense see *Davis v. Randall*, 115 Mass. 547. The jury found for the plaintiff. Before the case was submitted to the jury the presiding judge, at the plaintiff's request, ruled that "There is no evidence in this case to warrant a verdict for the defendant, on the ground that the bank of which the plaintiff is receiver was the accommodated party." An exception taken to this ruling is the only question presented in this case.

Where a defendant for the accommodation of a debtor and without consideration gives his note or check to a creditor of the debtor in payment of or as security for the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. That is the rule of the negotiable instruments act (R. L. c. 73, § 46), which governs the case. The negotiable instruments act in this regard is a codification of the common law. The creditor who has accepted it can recover on the accommodation note or check (*Pacific Bank v. Mitchell*, 9 Met. 297; *Thompson v. Shepherd*, 12 Met. 311; *Lowell v. Bickford*, 201 Mass. 543), and the fact that the creditor knew that the note or check was given for the accommodation of the debtor is not a defense (*Tucker v. Jenckes*, 5 Allen, 330; *Indian Head National Bank v.*

Clark, 166 Mass. 27; *Neal v. Scherber*, 207 Mass. 323), for that is the purpose of the transaction. In such a case however the debtor cannot sue on the note or check, for as to him the note or check is a mere gratuity. *Quinn v. Fuller*, 7 Cush. 224. *Corlies v. Howe*, 11 Gray, 125. *Nesson v. Millen*, 205 Mass. 515.

We understand the defendant's contention on the question raised by this ruling to be that on his testimony the jury were warranted in finding that the check here sued on was given at the solicitation of the cashier of the bank and not at the request of Pearson, who was in New Hampshire at the time, and that if the jury so found, the plaintiff and not Pearson was the "party accommodated" within the rule that the party for whose accommodation a note or check is given cannot sue on it, for as to him it is a mere gratuity. But even if the note was given at the cashier's solicitation it was confessedly given to be passed to the credit of Pearson's overdrawn account in order to make the account whole. That is to say, it was given for the accommodation of Pearson who was the debtor, and not for the accommodation of the bank, which was the creditor. The entry must be

Exceptions overruled.

FRED HARRINGTON vs. BOSTON AND MAINE RAILROAD.

Suffolk. November 13, 14, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Railroad, Duties of freight brakeman. Agency, Scope of authority.

It is not within the scope of the employment of a brakeman on a freight train, which is in charge of a conductor, to eject from the train a trespasser who is stealing a ride.

TORT for personal injuries sustained by the plaintiff on March 18, 1908, when he was a trespasser on a freight train of the defendant, alleged to have been caused by the wanton or reckless action of a freight brakeman of the defendant in throwing or pushing the plaintiff from the train when it was moving at a high rate of speed. Writ dated March 19, 1909.

In the Superior Court the case was tried before *Raymond, J.*, who refused to order a verdict for the defendant or to rule that on all the evidence the plaintiff could not recover. The defendant then asked the court to rule that the evidence was not sufficient to warrant the jury in finding that it was within the scope of the freight brakeman's authority to eject the plaintiff from the train. The judge refused to make this ruling, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$4,250. The defendant alleged exceptions.

A. R. Tisdale, for the defendant.

R. H. Sherman, for the plaintiff.

HAMMOND, J. At the close of the evidence the trial judge refused to rule, as requested by the defendant, that the evidence was "not sufficient to warrant the jury in finding that it was within the scope of the freight brakeman's authority to eject the plaintiff from the train;" and the sole question here presented is whether this refusal was error.

The train was a regular freight train. There were upon it the engineer and the fireman, whose stations were upon the engine, the conductor, who was in charge of the train, and two brakemen, called respectively the head brakeman and the rear brakeman. There was also upon the train a conductor of another railroad "travelling in charge of perishable freight," but he does not seem to have had any duty or authority as to the management of the train, or, indeed, to have been in any way a servant of the defendant. The plaintiff was "stealing a ride," and hence a trespasser.

In support of his contention that in ejecting him from the train Bodah, the offending brakeman, was acting within the scope of his authority, the plaintiff relies in the first place upon the general proposition that a brakeman upon a freight train, is, by virtue of his position as such, vested with authority to remove trespassers.

It never has been decided that such is the law in this Commonwealth, although some allusion has been made to this question. In *Planz v. Boston & Albany Railroad*, 157 Mass. 377, 380, which was a freight train case, Knowlton, J., said: "It does not expressly appear to have been within the scope of the brakeman's employment to order persons found riding on the train without leave to get off, and it has sometimes been held that an ordinary brakeman of a freight train has no authority to give such an order. . . .

But in considering this case we prefer to assume in favor of the plaintiff, without deciding, that it was a question of fact for the jury whether Walton, from his general employment as a brakeman, had authority to represent the defendant in ordering a trespasser to leave the train." In *Mugford v. Boston & Maine Railroad*, 173 Mass. 10, which was also a freight train case, Holmes, J., says, "If we assume, without deciding, that the brakeman was acting within the scope of his authority." Each of these cases was decided for the defendant on other grounds, and in each as above stated the train was a freight train. In *Bjornquist v. Boston & Albany Railroad*, 185 Mass. 130, cars were being moved about in the freight yard, and the brakeman was acting in the management of them just before the accident, and it "[did] not appear that any other person was employed at that time in the control of them." Under these circumstances the court said: "If we assume that he was in charge of the cars, it was his duty to do all that he reasonably could to keep trespassers away from them." This case also was decided for the defendant on other grounds. In *McKeon v. New York, New Haven, & Hartford Railroad*, 183 Mass. 271, which was an action for injuries received by being ejected from a passenger train, it was said that while the duties of a brakeman primarily relate, as his name implies, to the management of the brakes, common observation shows that on passenger trains they embrace much more, in that he is required to look after the safety and comfort of passengers, to protect the property of the company, and to see that fares are not evaded; and such were the rules of the company. It was therefore held that it was within the scope of his authority to remove the plaintiff in a lawful manner from the platform if he was there for the purpose of evading his fare. But the case was distinguishable from the case of a brakeman upon a freight train, the court saying (p. 275): "It is manifest that the duties of a brakeman on a freight train would or might be different from those of a brakeman on a passenger train."

When we look to the decisions in other jurisdictions we find a conflict of authority. We do not deem it necessary to go over them in detail. Those which favor the general proposition seem to rest upon the doctrine adopted by them that "wherever a railway servant is put in charge of any property of the railway, as

a station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is, therefore, for that purpose vested with an implied authority to remove trespassers therefrom." See for example *Brevig v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 64 Minn. 168, 172. Those opposed to the proposition maintain in substance that this doctrine is not applicable in the case of a freight train where there is a conductor, that this business has no reference to passengers or the payment of fare, that the conductor is the person presumably in charge of the train and there is no reason for the presumption in such a case that any of the subordinates like brakemen are. See for example *Farber v. Missouri Pacific Railway*, 116 Mo. 81, and also *Chicago, Rock Island & Pacific Railway v. Brackman*, 78 Ill. App. 141, where there is a good review of the authorities on each side.

On the whole we think that on principle and the weight of authority the proposition that in a case like the present there is a presumption that the brakeman as such is vested with the authority to remove trespassers is not sound. For some of the leading cases where the question is discussed, some one way and some the other, see in addition to the cases above named, *Marion v. Chicago, Rock Island & Pacific Railway*, 59 Iowa, 428; *International & Great Northern Railway v. Anderson*, 82 Texas, 516; *Chesapeake & Ohio Railway v. Anderson*, 93 Va. 650; *Towanda Coal Co. v. Heeman*, 86 Penn. St. 418; *Dixon v. Northern Pacific Railway*, 37 Wash. 310; *Kansas City, Fort Scott & Gulf Railroad v. Kelly*, 36 Kans. 655; *Northwestern Railroad v. Hack*, 66 Ill. 238; *Hoffman v. New York Central & Hudson River Railroad*, 87 N. Y. 25; *Smith v. Louisville & Nashville Railroad*, 95 Ky. 11. See also 3 Elliott on Railroads, (2d ed.) § 1255, and cases cited in the notes, and Wood on Railroads, (2d ed.) § 316.

It is further contended however by the plaintiff that even if that be so, still there was evidence that in this particular case Bodah had such authority. No such authority is found in the rules of the company. Indeed so far as they have any bearing directly or indirectly upon the matter they point in the opposite direction. Rule 712 provides that enginemen shall not allow any

person to ride upon their engine except in certain cases therein specified. Rule 668 provides that, with certain exceptions not here material, conductors of freight trains shall not allow any person to ride on their trains. There are several rules defining the duties of brakemen, but none of them provides that they are in charge of any car.

And without going over the other evidence in detail it is sufficient to say that it does not warrant a finding that Bodah ever had authority from the conductor or anybody else to eject the plaintiff from the car. The act is not shown to have been within the scope of his employment.

The refusal, therefore, to give the ruling requested was error.

Exceptions sustained.

CORNELIUS SULLIVAN vs. FRANCIS M. WILSON & another.

Suffolk. November 14, 1912. — January 28, 1913.

Present: RUGG, C. J., LORING, BRALEY, & SHELDON, JJ.

Snow and Ice. Notice. Nuisance.

Under the provision of St. 1908, c. 305, that a notice of injuries resulting from snow or ice may be left with the occupant of the premises, "or, in case there is no occupant," may be posted "in a conspicuous place thereon," the leaving of a notice with the occupant and the posting of a notice in a conspicuous place are different things, and a notice posted on the outside of a vacant tenement, which is one of two tenements of a single house or one of four tenements of a double house, is not left with the occupant of the house.

Under the provision of St. 1908, c. 305, that a notice of injuries resulting from snow or ice may be left with the occupant of the premises, "or, in case there is no occupant," may be posted in a conspicuous place thereon, if the premises consist either of a double house containing four tenements, of which one is vacant and the other three are occupied, or of a single house, containing two tenements, of which one is vacant and the other occupied, notice cannot be given by posting, which can be done only "in case there is no occupant."

Under the provision of St. 1908, c. 305, that notice of injuries resulting from snow or ice may be left with the occupant of the premises "or, in case there is no occupant," may be posted in a conspicuous place thereon, if it appears in an action where proof of such notice is necessary, that the premises consisted either of a double house containing four tenements or of a single corner house containing two tenements, evidence, that the plaintiff's agent rang the door bell and knocked on the door of the lower tenement on the corner, which was unoccupied,

but did not ring the door bell of the upper tenement on the corner nor the door bell of either of the other two tenements, and that he made no inquiries in the neighborhood as to whether the house was wholly unoccupied, and testimony of the plaintiff's attorney to the effect that by the outward appearance of the building it was unoccupied, do not warrant a finding that there was no occupant of the house, whether it was a single house or a double one.

TORT for personal injuries sustained by the plaintiff on December 31, 1909, by reason of snow and ice falling upon him from a building owned and controlled by the defendants when the plaintiff was walking upon the sidewalk of Rock Street in Boston at or near the corner of Regent Street. Writ dated April 29, 1910.

In the Superior Court the case was tried before *Morton, J.*, who ruled that the plaintiff was not entitled to maintain his action because he had failed to show that he had complied with the requirements of St. 1908, c. 305. The facts bearing upon this question as shown by the evidence are stated in the opinion. The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

E. P. Saltonstall, (*C. W. Blood* with him,) for the plaintiff.

F. T. Hammond, for the defendants.

LORING, J. This is an action for injury to the plaintiff while walking on Rock Street in the city of Boston, caused by ice falling on him from the house on the corner of that street and Regent Street. The only question is whether the evidence warranted the jury in finding that St. 1908, c. 305, was complied with.

Although the only testimony as to the real as distinguished from the apparent facts in connection with the occupation of the house came from a witness called by the defendants, the plaintiff has argued the case on the assumption that the facts so testified to were true. The case could properly be considered on that basis.

The building in question is stated in the bill of exceptions to have been "a double house, having four tenements, two upstairs and two on the first floor, and that there was a brick wall through the middle of the house running at right angles to Regent Street and that it was such a house that one half could be sold and disposed of independent of the other." The facts as to its real occupation were that at the time of the accident and for several months thereafter, the lower floor of the half on the corner was vacant and the upper floor of that half and both floors of the other half

were "occupied by tenants" under oral leases. It would seem from the photographs made part of the bill of exceptions that there was a front door to each tenement, all facing on Regent Street.

Within the specified time the plaintiff's brother tacked a notice on the bay window between the corner and the first outside door on Regent Street, which was the door to the lower flat on the corner.

The plaintiff's first contention is that since the statute provides that "leaving the notice with the occupant" shall be a sufficient compliance with the act, the statute was complied with by tacking the notice on the outside wall of the vacant tenement. There is nothing in this contention. Under St. 1908, c. 305, "leaving the notice with the occupant" and "posting the same in a conspicuous place" are different things. In the case at bar the notice was posted not left with the occupant.

The posting of the notice was not a compliance with the statute because the evidence did not warrant a finding that there was "no occupant" of the premises. Having regard to the real facts put in evidence by the defendants, there is no question on that point whether the four flats are to be taken (as in the bill of exceptions) to be one double house, or whether the upper and lower flats on the corner are to be treated as a separate house. If one flat was occupied, we are of opinion that notice could not be given by posting, for that can be done only "in case there is no occupant."

If the plaintiff had not waived his right to ask the jury to disbelieve the testimony of the defendants' witness as to the occupancy of the building, the result would have been the same. The plaintiff's agent went no further than to ring the door bell and knock on the door of the lower flat on the corner. He did not ring the door bell of the upper flat on the corner nor that of the other two flats, nor did he make any inquiries in the neighborhood as to whether the corner house, if that could be considered a separate house, or the double house (treating the four flats as making one double house) was wholly unoccupied. The only evidence introduced by the plaintiff in addition to this was the testimony of the plaintiff's attorney to the effect that by the outward appearance of the building it was unoccupied. All this evidence taken as a whole did not go far enough to warrant a finding that there was no occupant of either one of the flats on the corner, treating

the corner as a separate building, or of any one of the four flats, treating the building as a double house.

Exceptions overruled.

HENRY J. DIXON vs. VOLUNTEER CO-OPERATIVE BANK.

Suffolk. November 14, 15, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Damages, In contract. *Practice*, Civil, Ordering verdict. *Attorney at Law*.

In an action of contract for the alleged wrongful termination by the defendant of a contract to employ the plaintiff for one year, the presiding judge properly may refuse to rule, that, admitting that the plaintiff had been dismissed wrongfully from his employment, a verdict must be ordered for the defendant unless the plaintiff proves his actual loss by showing what he has done with his unemployed time and how much he has earned elsewhere; because, even if such a rule of damages should be applied, the plaintiff still would be entitled to nominal damages.

An attorney at law, who is employed by a co-operative bank as its attorney for a year to perform the duty of examining the titles to land offered to the bank as security for loans to be made to applicants, by whom the attorney is to be paid for his services, such earnings amounting to about \$1,300 a year, is not bound to account to the bank for his time, and, if he is discharged wrongfully by the bank shortly after the beginning of the year for which he was employed, in an action by him against the bank for its breach of contract the damages to which he is entitled are not to be diminished by reason of his earnings from additional work undertaken by him after his wrongful discharge by the defendant.

CONTRACT, by an attorney at law against a bank, for breach of an agreement made on January 18, 1911, to employ the plaintiff as the attorney of the defendant for the term of one year, alleging that the defendant wrongfully discharged the plaintiff as such attorney on February 15, 1911. Writ in the Municipal Court of the City of Boston dated February 16, 1911.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. The jury returned a verdict for the plaintiff in the sum of \$1,413.12; and the defendant alleged exceptions, raising the questions which are stated in the opinion and the footnotes.

E. N. Carpenter, for the defendant.

A. D. Hill, for the plaintiff.

LORING, J. 1. The defendant cannot complain that the jury were allowed to find that the plaintiff's employment was for a year. The directors' records state that "Director Merrick nominated Henry J. Dixon to be the Atty. of the Bank for the current year," and thereupon it was voted that Swain (the present attorney) and Dixon (the plaintiff) be considered as nominees, and on the roll being called the plaintiff was declared elected, it "being understood that all conditions shall be continued as by his predecessor, Mr. Swain." It also appeared from the directors' records that in each of the years 1905, 1906, 1907, 1908, 1909 and 1910 it was voted that Swain "be the attorney for the bank for the ensuing year." There was ground for contending that the vote by the directors under which the plaintiff was elected as matter of law made his employment one for a year. But, however that may be, the votes stated above taken together warranted a finding to that effect. The jury were not bound to believe Swain's testimony that he had not been elected by the year. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

The exception to the first ruling asked for * must be overruled.

2. The exception taken to the refusal to give the fourth ruling asked for † must be overruled. Even if the rule of damages there stated had been the rule which should have been applied in the case at bar the result would have been that the plaintiff would have been entitled to nominal damages, not that the defendant would have been entitled to a verdict.

3. This brings us to the exception taken to the rule of damages

* The first ruling asked for was as follows: "On all the evidence a verdict should be directed for the defendant."

† The fourth ruling asked for was as follows: "The mere fact that an employer has determined the relation of employment by an illegal dismissal, does not entitle the dismissed employee, on that account, to recover what he might or would have received for the entire remainder of the employment period by being ready and willing to serve; all that he is entitled to in the way of damages is indemnity; it is part of his case to prove what he has done with his unemployed time, how much earned and what, if anything, is his actual loss; if he puts in no evidence, or insufficient evidence on that matter there is nothing to show that he might not actually have earned more in other occupation of his time, and a verdict on that account should be directed for the defendant in this case because plaintiff has so failed here."

which the presiding judge told the jury to follow in rendering their verdict in case the question of damages was reached by them.

Whether the judge was wrong in instructing the jury as he did depends upon the case which had been made out in evidence including the contentions which the parties had made on that case.

The plaintiff brought this action to recover damages for breach by the defendant of its contract to employ him as its attorney for the year ending January 18, 1912. Under the verdict rendered in this court he was wrongfully dismissed on February 15, 1911, when less than a month of the year had expired.

The plaintiff had been admitted to the bar in August, 1908, and "began his practice of law in the fall of 1908," that is to say, a little over two years before the defendant agreed to employ him as its attorney for a year. The work which the plaintiff was to do under his employment by the defendant consisted in examining titles to land offered to the bank as security for loans to be made by it to the applicants. For these services he was to be paid by the applicants, not by the bank.

It was agreed that the attorney employed by the bank in place of the plaintiff "earned from January 18, 1911 to January 18, 1912 as fees from borrowers for work he did in examining titles on loans made by the defendant bank during said period the sum of \$1,320.63; that he received no payments direct from the defendant bank for any services during said period because of the fact that no services had been required of him by said bank or been performed by him during said period." This was all the evidence bearing on the question of damages.

The record does not disclose what the contentions of the parties were upon the damages due to the plaintiff except so far as they may be gathered from the fourth ruling asked for by the defendant which is stated above.

The instruction given to the jury was as follows: "If the plaintiff is entitled to recover, the plaintiff is entitled to have what you should find would be the loss to him by the failure on the part of the defendant company to give him such work as might be reasonably expected by him during the year."

In his fourth request for a ruling the defendant has assumed that the rule of damages which should be applied in the case at bar is the rule applicable in a case where there is a wrongful dis-

charge of an employee all of whose time (under the contract of employment which has been broken) was to be given to the employer. It is not necessary to decide whether the rule applicable in that case was or was not correctly stated in the fourth request. The matter is discussed and the authorities are collected in *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1. For that rule has nothing to do with this case. Before the plaintiff was wrongfully discharged by the defendant from his position as its attorney he had a right to take on additional work without accounting to the defendant for the profits derived from it. That right was not lessened by the defendant's breach of its contract with the plaintiff by wrongfully discharging him from his position as its attorney. Under the contract broken by the defendant the plaintiff's time did not belong to the defendant. The plaintiff was not the defendant's servant and so bound on being wrongfully discharged to make use of his time (which under the contract was the defendant's) so as to minimize the damages suffered by him. On the contrary the plaintiff was in the position of the subcontractor in *Olds v. Mapes-Reeve Construction Co.* 177 Mass. 41. In that case a subcontractor for the erection of part of a building was notified not to proceed with his contract with the principal contractor, the principal contract having come to an end before the building was completed. Subsequently the subcontractor finished the work he was to have done under the subcontract, under a new contract with the owner. It was held in an action brought by the subcontractor against the principal contractor that he (the subcontractor) did not have to account for the profits made by him under the subsequent contract with the owner and could recover from the principal contractor the difference between the price to be paid under the subcontract and the cost of the work to be done under it. For these reasons we are of opinion that the rule of damages which applies in case a servant is wrongfully discharged is not applicable in the case at bar.

In what then was the ruling given wrong? There is a difference between *Olds v. Mapes-Reeve Construction Co.* and cases like that now before us, but it is of no consequence in the case at bar. The difference consists in the fact that the subcontract in *Olds v. Mapes-Reeve Construction Co.* was one which did not require the personal attention of the subcontractor, while in the

work of examining titles the personal services of the attorney himself are to some extent required. Doubtless some of the work of examining titles can be delegated to subordinates, but the final opinion of the validity of the title submitted to him must be given by the attorney himself. The fact that the subcontract in *Olds v. Mapes-Reeve Construction Co.* did not require the subcontractor's personal attention was relied on in the opinion in that case as a material fact. This difference between the two cases may lead to a possible limitation, namely: In case it were made out that an attorney employed to examine titles could not do any other work in addition to it, he could not before he was wrongfully discharged take on other work, and in such a case, if he took on additional work after being wrongfully discharged it would seem that he would have to account for the profits. But there was nothing in the facts in evidence in the case at bar which could give rise to any question as to that limitation. In the case at bar the work to which the plaintiff was entitled under his contract with the defendant was given by it to Swain and Swain received for that work \$1,320.63. That would not necessarily so engross the time of an attorney that he could not take on additional work. Moreover Swain, to whom the defendant wrongfully gave this work, testified that he acted as attorney for a number of banks like the defendant. There was nothing in the evidence or in the contentions taken by the defendant which called for instructions on this possible limitation of the general rule that an attorney wrongfully discharged need not account for additional work taken on by him after the breach.

If the evidence had given rise to the point that what the plaintiff was entitled to as damages was the net profit which he would have made as distinguished from the gross amount which he would have received, the judge should have so instructed the jury. But there was nothing in the evidence bearing upon that distinction, and there was nothing in the contentions put forward by the defendant which made it necessary for the judge to go into an explanation of that matter, assuming that that question could have been raised on the evidence introduced in this case.

The instruction of the judge as to the damages due the plaintiff was correct so far as it went, and was all that was called for by the evidence which had been introduced and the contentions made

by the defendant on that evidence so far as they are disclosed in the record.

The entry must be

Exceptions overruled.

INHABITANTS OF MILLIS vs. MARY J. FRINK.

Norfolk. November 15, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Pauper. Municipal Corporations, Action against pauper under R. L. c. 81, § 9.

In an action by a town under R. L. c. 81, § 9, for expenses alleged to have been incurred for the support of the defendant as a pauper, it appeared that the defendant was a married woman and during the period in question was a pauper, that she had owned a small house in which she lived with her family, consisting of a feeble-minded and sick husband, a somewhat feeble-minded son, and, during a part of the time, a grandson, who was a schoolboy, that during the period in question she did all the household work, and that, when her husband died and her grandson had left home, she ceased to be a pauper. The action was brought to recover one fourth of the cost of the supplies furnished for the family on the ground that the defendant was supposed to have used one fourth of them. All of the supplies thus furnished had been charged by the overseers of the poor to the defendant's husband. *Held*, that the overseers of the poor well might have considered that the shelter and services contributed by the defendant toward the support of the family were equal to her share of the supplies and on this ground have determined to charge the supplies to the defendant's husband and not to her, and that under the circumstances this determination must be taken to be final.

LORING, J. When this case came on for trial the plaintiff and the defendant rested on the auditor's report. The presiding judge * ordered a verdict for the defendant, to which ruling the plaintiff town took an exception. Certain rulings were asked for by the plaintiff, and these were refused and an exception to that was taken. The case is here on a report under a stipulation that, if the ruling directing a verdict was right, judgment should be entered thereon.

The facts, found by the auditor, on which the case was submitted were in substance as follows: The action was brought under R. L. c. 81, § 9, to recover from the defendant as a pauper expenses

* *Stevens, J.* The auditor was Arthur P. Hardy, Esquire.

incurred by it for her support during the six years from 1905 to 1910, inclusive. During that time the defendant owned a small house worth (so the auditor found) "probably much less than \$1000," and mortgaged for \$450. In this house she lived with her husband, a son and a grandson who was a minor. The defendant during the six years in question was quite feeble and unable to do any work other than light housework, "and was ill more or less." Her husband during the six years was "in feeble health, both mentally and physically," was "ill more or less, and part of the time was obliged to have a nurse." The son "now" (i. e. in December, 1911) thirty-two or thirty-three years of age, "is feeble-minded;" he worked during the six years when he could secure employment and that was about half the time, and when he earned enough he paid his mother for his board. How much he paid and when, the auditor was not able to determine. The grandson "during the early part of the time" was at school and did not earn anything. "For the past three or four years" he has been at work "and has paid the defendant board," — how much was so paid the auditor could not determine. During the six years the overseers of the poor of the plaintiff town had standing orders, one with a grocer and the other with a milkman, to supply "the Frink family" with groceries to an amount not exceeding \$2 a week and a quart of milk a day; in addition, when the family was found to be in need of wood or coal, an order was given to furnish them with as much as was necessary. These supplies amounted to \$815.03. In addition to the supplies thus furnished by the overseers of the plaintiff town, other supplies consisting of meat, milk, wood and coal were bought by the defendant and paid for by her with money received from her son and grandson. All the supplies furnished by the overseers, amounting, as already stated, to \$815.03, were charged to the defendant's husband. The plaintiff seeks to recover from the defendant one fourth of these supplies on the assumption that she ate and used one fourth of them.

In addition to the defendant's share of these supplies the plaintiff sought to recover one fourth of the two following sums: (1) \$10 furnished the defendant to pay the interest on her mortgage in the year 1905; (2) \$59.33, which without solicitation on her part the overseers of the poor expended in paying the taxes on the

defendant's house during the four years 1906-1909 (inclusive), and in addition the whole of the sum of \$5.63, paid in 1910 for an insurance policy on the defendant's house.

The auditor found that the taxes were paid by the overseers without the defendant's knowledge, and were paid by them "because in their opinion it was cheaper for the board to pay the taxes assessed on the defendant's real estate than to have the estate sold, and the overseers of the poor then be obliged to procure board for the defendant and the rest of the household elsewhere." Similar findings were made as to their payment of mortgage interest and of the insurance premium.

The defendant's husband died in August, 1910, and within a reasonable time thereafter the defendant paid the grocer for supplies which she bought after that date, and notified the town that she did not wish to receive any further supplies from it. The auditor found that during the period covered by this action the defendant was a pauper, but that since her husband's death she has not been and is not now a pauper.

R. L. c. 81, § 9, under which this action is brought, is a reenactment of St. 1882, c. 113. A similar (although not identical) statute enacted in 1817 (St. 1817, c. 186, § 5) was repealed by the Revised Statutes in 1836. See *Groveland v. Medford*, 1 Allen, 23, 24, 25. As was said by Chief Justice Chipman in *Selectmen of Bennington v. M'Genness*, N. Chip. 45, reprinted in D. Chip. 44, and quoted by Metcalf, J., in *Stow v. Sawyer*, 3 Allen, 515, 517: "The provision made by law for the relief of the poor is a charitable provision. To consider it in any other light detracts much from the benevolence of the law." This of course was quoted by Metcalf, J., after St. 1817, c. 186, § 5, had been repealed and before St. 1882, c. 113 was passed. The law is now otherwise. But the present act has been construed in a liberal spirit by this court. In *Taunton v. Talbot*, 186 Mass. 341, it was held, in an action under R. L. c. 81, § 9, to recover from a pauper the cost of supporting him in the plaintiff town's almshouse, that the pauper could show that the services rendered by him while an inmate were worth the amount of that cost; and if they were he was not liable.

The action of the plaintiff town in the case at bar is narrow, if not harsh. The auditor has found that the defendant was a

pauper and that finding has not been disputed by the defendant. But although the defendant is to be taken to have been a pauper it is apparent from the report that she was made one because of the burdens thrown upon her by her family consisting of a feeble-minded and sick husband, a somewhat feeble-minded son, and during a part of the time by a grandson under age and at school. To this family she gave the shelter of the house which she owned, and on the report it would seem that for this family she did all the household work. That this is the true aspect of the defendant's pauperism is shown by the fact that now, since the husband has died and the grandson has left home, the defendant is not and is found by the auditor not to be a pauper.

If the defendant were to be charged for one fourth of the supplies furnished the Frink family, because she is supposed to have used one fourth of them, the question immediately arises what was the value (1) of the shelter she gave to her husband, who was found by the auditor to be a pauper, and to her son and grandson, who on the report may have been paupers; and (2) perhaps what was the value of the services which she rendered in doing the household work for the pauper husband at any rate, and possibly for the son and grandson. Under the decision in *Taunton v. Talbot*, *ubi supra*, so far as the defendant and perhaps her husband (who were found to be paupers) were concerned she was entitled to set up the value of her services in recoupment.

The overseers of the poor have taken a broader view of the situation than that taken by the plaintiff town. They considered that these supplies were furnished not to the defendant but to her husband, and they may well have taken this view on the ground that (as in *Taunton v. Talbot*) the shelter and services contributed by the defendant were equal to her share of the supplies. They determined to and did furnish the supplies to the defendant's husband and not to her. Under the circumstances this must be taken to be final.

The entry must be

Judgment on the verdict.

The case was submitted on briefs.

H. T. Richardson, for the plaintiff.

D. B. Beard & G. T. Perry, for the defendant.

STROOCK PLUSH COMPANY vs. NEW ENGLAND COTTON YARN
COMPANY.

Suffolk. November 15, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, What constitutes, Construction.

A cotton broker made and signed a sale note showing a sale by a manufacturer of cotton yarns, for whom he might have been found to have been acting, of a quantity of cotton yarn to be delivered before November 1 of a certain year, shipments to be specified by the purchaser, who agreed to give at least one month's notice of deliveries required. The broker sent duplicates of the note to the manufacturer and to the purchaser by letters. The manufacturer at once informed the broker that he would accept the note as written with the understanding that the purchaser would not call for more than a certain number of pounds per month, and the broker so informed the purchaser by letter. The purchaser replied at the same time both to the broker's letter enclosing the sale note and to that stating the manufacturer's proposed modification of the agreement, stating that he was unwilling to accept the modification. There was much correspondence between the parties through the broker which finally ended in a letter from the purchaser stating a certain amount of yarn which, he was "quite sure," would "be the maximum" that he would require in any month. This the manufacturer understood to be an agreement by the purchaser not to ask for more in any month than the amount so stated as a "maximum." The purchaser, on September 17, asked for shipments in excess of the "maximum" stated. The manufacturer shipped a certain sum less than such "maximum." In an action by the purchaser for the difference between the contract price and the market price of the yarn which he had ordered and which had not been delivered, the manufacturer admitted liability as to the amount less than the maximum which he had shipped in the last month of the contract. *Held*, without determining whether any contract was made by the parties, that the defendant's liability did not exceed what he admitted.

CONTRACT upon an alleged contract in writing for the sale by the defendant to the plaintiff of cotton yarn, claiming damages for the defendant's failure to deliver the amount of such yarn alleged to have been required by the contract. Writ dated January 5, 1910.

Material portions of the sale note, alleged in the declaration to be a contract, were as follows:

"November 12th, 1908.

"Sold for account of New England Cotton Yarn Company, Boston, Mass.

By J. M. Prendergast & Co.

Cotton Goods and Yarn Brokers.

To Stroock Plush Company, Newburgh, New York.

"About one hundred and fifty thousand (150,000) pounds of No. 8-1 A. M. B. quality yarn, on seller's section beams, to be delivered ten (10) beams as promptly as possible. Balance of deliveries to begin about January 15th, 1909, and shipments to be specified by buyer, it being understood buyer will give at least one (1) month's notice of deliveries required. This contract to terminate November 1st, 1909. . . .

Price Fifteen (15) cents per pound, less two (2) per cent,

Terms Cash tenth (10th) of month following date of shipment,

Deliverable Free on board at Newburgh, New York.

J. M. Prendergast & Co.

Brokers.

Shipping directions

Stroock Plush Company,

Newburgh, New York."

In the Superior Court the case was heard by *Dana, J.*, without a jury. There was evidence tending to show that J. M. Prendergast and Company were cotton goods and yarn brokers who had done business with the defendant for seven or eight years, acting as agents or brokers for it, and during that period had sold a considerable amount of yarn for it to various purchasers including several sales to the plaintiff; that they acted as brokers in this transaction; that before the sale note was prepared a representative of the brokers talked over the telephone in regard to it with the sales manager of the defendant; that in the course of dealings with the defendant J. M. Prendergast and Company had no authority to sign sale notes so as to bind the defendant and that it was necessary that sale notes should be submitted to the defendant for confirmation. There also was evidence that no notice of any special limitation upon the general authority of J. M. Prendergast and Company to act for the defendant ever was given to the plaintiff.

It appeared that the sale note, which was set out as a contract in the declaration, was prepared by J. M. Prendergast and Company after negotiations with both parties, the original being sent in a letter to the plaintiff and a duplicate original being sent in a letter to the defendant. The letter to the plaintiff stated, among other things, the following: "We trust you will find the sale note correct and satisfactory in every particular. The N. E. Cotton Yarn Company requested us to ask you to be sure and make an arrangement so as to give them at least one (1) month's notice for each set of deliveries you will require. They would prefer to have 6 weeks' notice if you can see your way clear to give it to them. They are very busy on this grade of work and they say it would be for your interest to give them as long a time notice as you can so there will be no chance of any slip up in their furnishing the deliveries just as you want them. It will be satisfactory for you to return the beams freight collect as on previous order. We thank you very much for the order and hope everything is entirely satisfactory."

The defendant, immediately upon receiving the letter enclosing the duplicate original of the sale note, made by telephone to J. M. Prendergast and Company the statements which are set forth in a letter written by J. M. Prendergast and Company to the plaintiff on November 12, 1908, which was as follows: "Referring to our previous letter of today enclosing sale note for the No. 8-1 warp purchased from the N. E. Cotton Yarn Company we delivered the duplicate sale note of this transaction to the seller. They stated that they will agree to accept this as written with the understanding that you do not call for *over* 15,000 pounds per month at any time during the term of contract. Also if you wanted us to make the time of expiration changed from November 1st to say December 1st or January 1st they will be glad to do this for you. We would be pleased to hear from you on these points by return mail.

"Of course it is improbable that you would ask for over 15,000 pounds per month but the N. E. Cotton Yarn Company made the request of us to bring this to your attention and see that it was agreeable to you as they would not want to promise to ship over 15,000 lbs. a month at any time."

On November 13, the plaintiff wrote a letter to J. M. Prender-

gast and Company reading as follows: "We have your various communications of the 9th and 12th, and they are all right with the exception that your seller states we are not to insist on more than 15,000 lbs. per month. We do not like to bind ourselves not to take more than the 15,000 lbs.; there is very little likelihood that we shall take over 15,000 lbs. but we want to reserve the right to have occasionally, if necessary, more than the 15,000 lbs. per month. The chances are very much against it, you can write your people, but if we do need more than 15,000 lbs. we will give ample notice so they can furnish it. We trust that this will be agreeable to your seller. Please advise us."

On November 14, 1908, J. M. Prendergast and Company wrote a letter to the defendant setting forth in full the plaintiff's letter of November 13, and on November 16 the defendant replied as follows: "Answering yours of November 14th in reference to Stroock Plush Co's. letter of the 13th in regard to deliveries on their order for 150,000 pounds. Note customer feels that he may use more than 15,000 pounds in one month. This is agreeable to us if he will himself specify maximum quantity he expects to use. We are willing and anxious to accommodate him in every way, but feel that possible ground for misunderstanding in the future will be removed if he will so state. It is a matter of indifference to us whether he specifies as his maximum delivery 10,000 or 25,000 pounds, but we do feel that this is a point which should not be left open for future possible dispute."

The foregoing letter was transmitted to the plaintiff, and on November 18 the plaintiff wrote to J. M. Prendergast and Company as follows: "In reference to your letter in which you say that your seller insists on knowing the maximum amount in any one month, we do not see how we can tie ourselves down. We are not sure just what amount we shall require. My letter of recent date thoroughly explains the situation. It will be very little in excess of 15,000 lbs. in any one month, possibly it may not be nearly as much as 15,000 lbs., but we want and we expect the New England Cotton Yarn Co. to furnish us if necessary, on being given ample notice, to exceed the limit by one, two, three or four thousand pounds. There need be no misunderstanding. The writer simply wants the right during some period in 1909, to anticipate a further supply of yarn more than 15,000 lbs. and up to

20,000 lbs. Twenty, I am quite sure, will be the maximum. I hope this letter will settle the matter as far as your seller and ourselves are concerned."

This letter was transmitted to the defendant, who, on November 19, wrote to J. M. Prendergast and Company as follows: "In reference to delivery . . . note customer states he will not use more than 20,000 pounds in any one month. This maximum is satisfactory to us, and we are making notation on the order accordingly." J. M. Prendergast and Company transmitted this last letter to the plaintiff on November 20 in a letter closing with the sentence, "Will you please advise us if this is satisfactory." The plaintiff made no reply to that letter.

From November 24, 1908, until September 17, 1909, the defendant from time to time made deliveries of yarn to the plaintiff under the contract amounting in all to 96,270 pounds. Such deliveries constituted a full compliance with all requests for deliveries received by the defendant from the plaintiff to September 17, 1909.

On September 17, 1909, the plaintiff wrote to J. M. Prendergast and Company to give instructions to the defendant, "to have them ship all the yarn . . . we have on contract with them." This request was renewed from time to time in letters and the plaintiff suggested, on October 6, 1909, that the defendant might have a reasonable time after November 1 in which to complete the deliveries, but still insisted on having the entire amount of yarn mentioned in the contract. The defendant refused to comply either with the original request to deliver the whole balance before November 1 or with the subsequent request to deliver the whole balance within a reasonable time thereafter. The defendant delivered after September 17, 1909, 16,078 pounds of yarn, making the amount delivered under the contract 112,348 pounds, and then ceased deliveries.

At the close of the evidence, the defendant asked, among other rulings, for the following: "(7) Upon all the evidence in the case the plaintiff cannot recover, in any event, more than the fair market value on November 1, 1909, of 8,403 pounds of yarn of the kind and quality called for by the contract less the contract price for the same number of pounds." This ruling was refused, and the judge found and ruled that the plaintiff was entitled to

recover the difference between the market value on November 1, 1909, of 37,652 pounds of yarn of the sort described in the contract and the contract price therefor, and that such difference in value was five cents a pound. The judge found for the plaintiff in the sum of \$1,882.60; and the defendant alleged exceptions.

H. W. Brown, for the defendant.

Lee M. Friedman, for the plaintiff.

SHELDON, J. It is sufficiently manifest that the sale note, so called, drawn by Prendergast and Company, is not to be regarded as a contract between the parties. The authority of Prendergast to act for the defendant was certainly not clearly shown. But if it be said that there was some evidence of such authority, or at any rate some evidence that the defendant, in previous transactions with the plaintiff, had so far held out Prendergast as its agent that it could not now deny his authority, yet there was no evidence that he could bind the plaintiff, or that the plaintiff in any way had adopted the terms of the sale note before it was reduced to writing and communicated to the plaintiff on November 12, 1908, by Prendergast's sending to it a duplicate of the sale note. The utmost effect that could be given to the sale note, therefore, was to treat it as an offer made by the defendant to the plaintiff. But on the same day the defendant through Prendergast modified the offer by adding a stipulation that the plaintiff must not call for more than fifteen thousand pounds of yarn per month. The plaintiff's letter of November 13 to Prendergast establishes the fact that it received this modification before it had accepted the defendant's original offer. The plaintiff was unwilling to accept the offer as thus modified, and there was considerable further correspondence. Finally the plaintiff wrote a letter which, rightly or wrongly, the defendant regarded as a stipulation by the plaintiff that it would not call for more than twenty thousand pounds of yarn per month, and the defendant consented to this in writing, its consent was communicated to the plaintiff; and deliveries began to be made by the defendant to the plaintiff.

Under these circumstances, it is plain that either there was no binding contract between the parties because the original offer had been modified before its acceptance and their minds never had met upon the offer as modified, or else that the contract contained

a stipulation that the plaintiff should not require the delivery of more than twenty thousand pounds of yarn per month. In the former case, the plaintiff cannot maintain its action at all, and judgment must be for the defendant.

On the latter hypothesis, the defendant would be liable for the non-delivery of about eight thousand four hundred pounds. As at the argument before us the defendant conceded its liability to this extent, we need not determine which alternative was correct.

The result is that the defendant's seventh request for instructions should have been given; the exceptions must be sustained; and there must be a new trial on the question of damages only.

So ordered.



ANNA GREEN vs. LEAH PEARLSTEIN & another.

Suffolk. November 15, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Of one controlling real estate. Landlord and Tenant.

If, in an action against the owner of a tenement house for personal injuries alleged to have been received by one of the family of a tenant because of a defective condition in the ceiling of a passageway used in common by all the tenants, it appears that previous to the injury the defendant had given to another person a lease of the premises which was in force at the time of the injury, and there is no evidence that such lessee had not taken possession of the premises or was not in control of them, it is immaterial what was the defendant's motive in making the lease, and a verdict properly may be ordered for the defendant.

At the trial of an action against one in control of a tenement house for personal injuries received by the wife of a tenant by reason of plaster falling upon her from the ceiling of a passageway used in common by the tenants, there was evidence tending to show that the ceiling was not obviously defective when the plaintiff and her husband took possession of their tenement although the plaintiff noticed that it was cracked and that "little pieces" were hanging down, that later, after rains, it became defective and that the defendant, when asked to repair it, refused to do so. *Held*, that there was evidence of due care on the part of the plaintiff and of negligence on the part of the defendant which made him liable to the plaintiff as a member of the family of a tenant.

TORT against the owner and lessee of a tenement house for personal injuries suffered by the plaintiff by reason of some plaster falling upon her in a passageway used by all the tenants. Writ in the Municipal Court of the City of Boston dated November 9, 1910.

On appeal to the Superior Court the case was tried before *Hitchcock, J.* The plaintiff contended that the defendant Pearlstein was the real landlord of the premises, notwithstanding the lease to the defendant Geller, described in the opinion, and introduced evidence tending to show that, while the lease "recited that Geller had to pay water rates," the receipts for their payment were "in the name of Mr. and Mrs. Pearlstein," and that the defendant Pearlstein's husband, when spoken to by the plaintiff's physician as to the plaintiff's injuries, asked the physician "not to be too hard on him as to the accident."

There was evidence tending to show that there was no noticeable defect in the ceiling in question when the plaintiff's husband hired a tenement from Geller. In cross-examination the plaintiff's husband stated that the ceiling was "all the time" in as bad condition as it was when the plaintiff was injured. He was asked, "Was the condition of the ceiling from where the plaster came any different on November 1 from the condition it was in when you first came there?" and answered, "Well, it was in the same condition it was the whole month."

The plaintiff testified that the day on which she and her husband moved into the tenement was dry, and that she then noticed that the ceiling, at the point from which later a piece fell upon her, was cracked and that "little pieces" were hanging down. She and others described in detail the leaking of water at that point during rain storms, and a change then in the appearance of the ceiling, and there was evidence that Geller had been asked to repair the ceiling and had refused to do so.

Other facts are stated in the opinion.

At the close of the evidence the judge ordered verdicts for both defendants; and the plaintiff alleged exceptions.

In this court the defendant Geller did not appear.

L. R. Eyges, for the plaintiff.

G. E. Curry, for the defendant Pearlstein.

SHELDON, J. The plaintiff put in evidence that the defendant Geller had taken from the defendant Pearlstein a lease of the

house which contained the tenement hired by the plaintiff's husband, and was in control thereof at the time of her injury. There was no dispute that her husband's hiring was from Geller. The rest of Geller's testimony might have created some suspicion as to Mrs. Pearlstein's motive in giving the lease to him, but did not tend to show that he had not in fact taken possession of the leasehold interest, or that he was not in control of the premises. If so, the motive of the lessor was not material. *Curtis v. Galvin*, 1 Allen, 215, 216. *Pratt v. Farrar*, 10 Allen, 519. What Mrs. Pearlstein's husband said to Dr. Lazarus could not be evidence against her, nor was she bound by the way in which receipts for water rates were taken, unless in each case there had been further evidence to connect her therewith. It follows that on the plaintiff's own showing the verdict in favor of Mrs. Pearlstein was rightly ordered. *Mellen v. Morrill*, 126 Mass. 545. *Rice v. Boston University*, 191 Mass. 30. *Coman v. Alles*, 198 Mass. 99. *Taylor v. Loring*, 201 Mass. 283.

But, as to the defendant Geller, the case stands differently. In spite of some of the answers given by the plaintiff's husband on cross-examination, the jury could find that Geller had negligently failed to keep the ceiling of which a part fell upon the plaintiff in as good condition as it had appeared to be when her husband hired the tenement, and so the case is not governed by the decisions upon which the defendant relies. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357, 361. *Quinn v. Perham*, 151 Mass. 162. *Moynihan v. Allyn*, 162 Mass. 270. *Hannaford v. Kinne*, 199 Mass. 63.

There was evidence that the ceiling was over a common passageway which he was bound to use due care to keep in as good condition as it appeared to be when he let the tenement, and the plaintiff could be found to have been in the exercise of due care. *Ward v. Blouin*, 210 Mass. 140. *Callahan v. Dickson*, 210 Mass. 510. Her rights were the same that those of her husband would have been under the same circumstances. *Domenicis v. Fleisher*, 195 Mass. 281. *Nash v. Webber*, 204 Mass. 419.

As to this defendant the exceptions must be sustained.

Ordered accordingly.

ARTHUR P. CURRIER vs. DONALD C. MACDONALD.

Suffolk. November 15, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions. Evidence, Relevancy and materiality.

At the trial of an action of contract upon a judgment the only question at issue was, whether the plaintiff had actual notice of bankruptcy proceedings of the defendant, and the defendant introduced evidence tending to show that, in the course of proceedings in the poor debtor court to enforce the judgment sued on, his attorney in March of a certain year had told the plaintiff's attorney of such proceedings and that consequently there had been a continuance of the case in the poor debtor court to March 15. The defendant offered a record of the poor debtor proceedings which showed that they were instituted before the bankruptcy proceedings, that there had been a large number of short continuances until the March 15 referred to, when there was a continuance until May 14, on which day the proceedings were dropped. Subject to an exception by the defendant, the judge excluded the record but permitted the defendant to introduce other evidence as to everything that took place in the poor debtor proceedings including the details of the continuances. *Held*, that, even if the exclusion of the record was erroneous, the exception should be overruled, as the defendant was not shown to have been harmed.

CONTRACT upon a judgment entered in the Municipal Court of the City of Boston on October 27, 1899. Writ in that court dated January 5, 1910.

On appeal to the Superior Court the case was tried before *Hitchcock, J.*

It appeared that the defendant had filed a petition in bankruptcy on March 12, 1900, on which day he was adjudged a bankrupt, and that he received his discharge on the fifth day of March, 1901. It was admitted by the defendant at the trial that the plaintiff's claim was not properly described by him in his schedules in the bankruptcy proceedings. The defendant contended, however, that the plaintiff had actual notice of the bankruptcy proceedings in time to prove his claim and introduced evidence in support of that contention to the effect that, during proceedings in the poor debtor session of the Municipal Court of the City of Boston, which the plaintiff had instituted to enforce his judgment, the defendant's attorney in March, 1900, notified

the plaintiff's attorney of the bankruptcy proceedings and that thereupon the poor debtor proceedings were continued to March 15, 1900.

The defendant offered in evidence the record of the poor debtor court which contained entries showing that the plaintiff cited the defendant to appear for examination on poor debtor process founded on the judgment several months before the day on which the defendant went into bankruptcy, and that in these poor debtor proceedings there was a large number of continuances each for a few days until March 15, 1900, at which time a continuance was had to the fourteenth day of May, 1900, and that on the fourteenth day of May, 1900, the poor debtor proceedings were dropped. The judge declined to admit the record in evidence, but permitted the defendant to introduce other evidence as to everything that took place in the poor debtor proceedings including the details of the continuances, and such other evidence was introduced at the trial.

There was a verdict for the plaintiff; and the defendant alleged exceptions.

C. H. Sprague, for the defendant.

G. F. Ordway, for the plaintiff, was not called upon.

HAMMOND, J. Apparently the only question of fact really in dispute was whether, as contended by the defendant, "the plaintiff had actual notice of the bankruptcy proceedings in time to prove his claim."

The facts stated in the record of the poor debtor court had only a very remote bearing, if any, upon that question. Moreover, while the presiding judge declined to admit the record, he permitted the defendant to introduce other evidence as to everything that took place in those proceedings, including the details of the continuances, "and such other evidence was introduced." It does not appear that the facts stated in the record were in dispute. Even if the exclusion was erroneous, the defendant does not show he was thereby prejudiced. On the contrary the fair and legitimate inference from the bill of exceptions is that he was not prejudiced.

Exceptions overruled.

MARY E. BRENNAN, administratrix, vs. EMPLOYERS LIABILITY
ASSURANCE CORPORATION, LIMITED.
SAME vs. L. P. SOULE AND SON COMPANY.

Suffolk. November 19, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, What constitutes, Validity, Construction. *Release*. *Words*, "Make it right."

Where a building contractor, in consideration of the signing and delivering by a laborer to him of a release discharging him from all demands arising from certain personal injuries which the laborer had sustained because of negligence of such contractor, agrees to pay to the laborer \$300 and, if the laborer is not able to resume work at the end of six weeks, to "make it right with" him, and the laborer signs and delivers the release and receives the \$300, a contract is made which is not void for indefiniteness, and the words, "make it right," may be found to mean that in the contingency named the laborer shall have fair compensation for his injuries paid to him in money exceeding the \$300 already paid to him.

TWO ACTIONS OF CONTRACT, the declaration in each case alleging that, in consideration of the plaintiff's intestate signing and delivering to the defendant in the second action, who was a building contractor, a release of all demands against such defendant arising out of personal injuries occurring through such defendant's negligence, such defendant paid him \$300 and agreed that, if he was not so far recovered at the end of six weeks that he could resume labor, "the defendant would make the plaintiff good to the extent of his damages and injuries;" that the plaintiff's intestate had not recovered sufficiently to resume work at the end of six weeks, but that the defendant refused to pay him more than the \$300 already paid. Writs dated October 22, 1908.

In the Superior Court the cases were tried together before *Morton*, J. It appeared that the defendant in the first action insured the defendant in the second action under a policy of casualty insurance; that the plaintiff's intestate, having been injured through negligence of the defendant in the second action, brought an action two days later against that defendant, and, eight or nine days later, went to the office of the defendant in

the first action and had a conversation with one Linscott, its agent, as to which he afterwards testified in substance as follows:

"Mr. Linscott says to me, 'I will give you . . . \$200.' So I shook my head. I said, 'That will never pay my bills for the time I am laid up' — in my own mind. He says, 'I will give you three.' I says, 'I won't take it.' . . . I went back anyway again. I says, 'Will you make it any more?' He says, 'No.' 'Well,' I says, 'I won't take it.' 'Now,' he says, 'Brennan you are a poor man, and I will leave this open — this offer open for you for two weeks. . . . You come in. . . . But I won't be here; I am going away. I am going away and I will leave this offer open for you for two weeks. Come in and take it, . . . any time you have a mind to.' . . . 'Now,' he says, 'You will be all right in six weeks' time now' — that was about six weeks after the accident — 'so you are doing pretty well. . . . You get a hundred a month; that is more than you can earn; that is eleven or twelve dollars a week.' I says, 'What if I am not able to go to work then at the end of six weeks? I want to, to maintain my family.' 'Well, now,' he says, 'if you are not all right, come back and see me, but I am sure you will have no occasion, I will make it right with you; I will make it right with you, but I am sure you will have no occasion.' "

Four days later the plaintiff's intestate returned to the office of the defendant in the first action, received \$300, signed and delivered a release discharging the defendant in the second action "from any and all claims, demands, actions and causes of action of every name and nature which I now have or might have upon or against said company, and especially from all claims arising out of any and all personal injuries, damages, expenses and any loss or damage whatsoever resulting or to result from " the accident in question "or which I may hereafter have from anything which has heretofore happened." That release was pleaded by the defendant in the action which already had been brought by the plaintiff's intestate, the action was tried and a verdict was ordered for the defendant.

Subsequently the plaintiff's intestate brought these two actions of contract; and, he having died, the administratrix of his estate was admitted to prosecute the actions in his stead.

The trial judge limited the plaintiff to testimony tending to

prove the contract declared on, and, at the close of the evidence, ruled in each case that the plaintiff could not recover, ordered verdicts for the respective defendants and reported the cases for determination by this court, judgments to be entered on the verdicts if the above ruling was right, and, if it was wrong, new trials to be ordered.

John Wentworth, (J. P. Magenis & T. C. O'Brien with him,) for the plaintiff.

J. A. Lowell, for the defendants.

HAMMOND, J. Upon the evidence the jury properly might have found that by the understanding of Brennan, the plaintiff's intestate, and Linscott, the \$300 was not the only consideration for the receipt, but that in a certain contingency, namely, Brennan's failure to recover fully within six weeks from the time of the settlement, then Linscott was to "make it right" with him; that he did not recover within the time named, and that each defendant is bound by the promise.

The jury might have found further that under the circumstances the words "make it right" meant that in the contingency named the plaintiff's intestate should have fair compensation paid to him in money for the injuries suffered by him by reason of the accident and that said compensation would exceed the three hundred dollars paid to him. The promise is not void on the ground that it is too indefinite. Juries are constantly solving such problems. The case for the plaintiff is much stronger than that in *Silver v. Graves*, 210 Mass. 26. See also *Noble v. Joseph Burnett Co.* 208 Mass. 75. Under the terms of the report there must be a new trial, and it is

So ordered.

JOHN C. ROCHFORD, administrator, vs. EDWARD ATKINS.
SAME vs. MARTHA M. ATKINS.

Suffolk. November 20, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Res Judicata. Mechanic's Lien.

If on a petition to establish a mechanic's lien the jury finds, upon one of the issues submitted to them which is material to a determination of the validity of the lien, that a certain construction mortgage was not given by the owner of the premises to pay off a prior mortgage and *pro tanto* in substitution for it, the owner and both mortgagees being parties to the petition, such finding is *res judicata* barring an action subsequently brought by the administrator of the estate of the owner against the second mortgagee seeking damages for alleged fraud on his part in taking an assignment instead of a discharge of the prior mortgage and then foreclosing it.

TWO ACTIONS OF TORT. The declarations alleged the same facts, namely, that on February 11, 1897, the plaintiff's intestate, Thomas J. Rochford, and "Martha M. Atkins by Edward Atkins" signed an agreement whereby, in consideration of a note for \$3,000 secured by a mortgage upon certain real estate in Newton, Martha M. Atkins advanced to the plaintiff's intestate \$1,200 and agreed to advance further sums as a building on the premises progressed; that at that time there was a mortgage upon the premises upon which there was a balance unpaid, which, "from the money called for in the agreement" above described, "was paid for the discharge" of the prior mortgage, as the defendant well knew; but that the defendant, in fraud of the plaintiff's intestate and without his knowledge or consent, received an assignment of the prior mortgage and later foreclosed it. Writs dated respectively May 19 and April 10, 1903.

In the Superior Court the cases were tried together before Brown, J.

It appeared that the mortgagee in the prior mortgage referred to in the declarations was one Winsor Gleason, who was dead at the time of the transactions there described. The plaintiff introduced evidence tending to prove the allegations of the decla-

rations, and also called one Walter H. Gleason, one of the executors of the will of Winsor Gleason, who among things stated that at the request of the father of Thomas J. Rochford, James M. Rochford, with whom he had had all his transactions, the mortgage was assigned to the defendant Martha M. Atkins instead of being discharged.

The record in the case of *Rochford v. Rochford*, 188 Mass. 108, referred to in the opinion, also was in evidence.

At the close of the evidence the judge ordered verdicts for the defendants, and reported the cases for determination by this court.

W. Hirsh, for the plaintiff.

E. F. McClennen & C. S. Hill, (*R. G. Kilduff* with them,) for the defendants.

SHELDON, J. We need not determine whether upon the plaintiff's allegations he can maintain an action at law, or whether his only right to relief would be in equity. The fundamental fact which he asserts and upon which he bases his claim against Mrs. Atkins is that she was bound to pay off and discharge the outstanding mortgage which the plaintiff's intestate had given to Gleason; that by agreement between himself, Gleason the prior mortgagee, and this defendant acting through her husband the defendant Edward Atkins, the mortgage to her was really given, to the amount due upon the Gleason mortgage, in payment of that mortgage and in substitution for it. The plaintiff put in some evidence in support of that contention. But in a previous suit brought by James A. Rochford to establish a mechanic's lien upon the mortgaged premises, to which Mrs. Atkins and Thomas J. Rochford the plaintiff's intestate were parties, the contrary of that contention was expressly found, and the claim now made passed *in rem judicatam*. See *Rochford v. Rochford*, 188 Mass. 108. The conclusion thus reached is binding upon all parties to that litigation. It follows, as Mrs. Atkins' mortgage was not given in payment of and substitution for the Gleason mortgage, that she had a right upon paying off that mortgage to take an assignment of it and to hold it as additional security against any intervening liens or attachments. Therefore the foreclosure of it for breach of its conditions was not unlawful, and the foundation of the plaintiff's claim against her fails.

Taking the most favorable view for the plaintiff of the evidence to support his action against Edward Atkins, it does not appear that he has done anything except as agent of his wife and in her right. As nothing has been done beyond what she had a right to do, the action against him can no more be maintained than that against her.

In each of these cases the entry must be

Judgment for the defendant.

WENTWORTH BARBRICK vs. BOSTON ELEVATED RAILWAY
COMPANY.

Middlesex. November 20, 21, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, In use of highway.

In an action against a street railway company by a boy seventeen years of age when injured, for personal injuries caused by the plaintiff being thrown from a team which he was driving by a collision with a street car operated by the defendant, there was evidence that the accident occurred on a very dark and foggy evening, that, on account of ice and snow between the right hand rail of the street railway tracks and the curbstone, the plaintiff was driving on the rails of the right hand track with the hubs of the left wheels projecting about a foot and a half beyond the rail on that side, that as the plaintiff approached a sharp curve to the left he listened for a gong and heard none, that when he was on the curve he saw ten or twenty yards distant the headlight of the defendant's car, which was approaching on the parallel track at a high rate of speed, that the plaintiff attempted to turn to the right, but that the hub of his left forward wheel was struck by the car and he was thrown out and injured. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the servants of the defendant were negligent, were for the jury.

TORT, by a boy seventeen years of age when injured, for personal injuries sustained on the evening of December 23, 1907, when the plaintiff was driving a horse attached to an express wagon on Elm Street in Everett, from a collision with a street car of the defendant at a point between Woodlawn Street and Birch Street. Writ dated January 20, 1908.

In the Superior Court the case was tried before *White, J.*, who at the close of the plaintiff's evidence ordered a verdict for the

defendant. The plaintiff alleged exceptions, containing a stipulation of the parties that, if the verdict was ordered for the defendant erroneously, judgment should be entered for the plaintiff in the sum of \$500; and that, if the verdict was ordered rightly, judgment should be entered for the defendant.

H. C. Long, for the plaintiff.

H. D. McLellan, for the defendant.

HAMMOND, J. There was a collision in the public highway, on a very foggy and dark evening, between a team driven by the plaintiff, a boy then seventeen years of age, and a street car operated by the defendant. The travellers were going in opposite directions.

The plaintiff testified as follows: "It was very foggy, very dark and foggy evening. So dense you could hardly see your hand before you. I was outward bound and the car was inward bound. The street wasn't very wide and as it was going the street curved to the left at the point where the accident happened. There was just enough space between the right-hand rail of the outbound track and sidewalk for a team to pass by getting up close to the sidewalk and on about five or six feet of this space there was a couple of inches of ice and snow which was melting at the time. I was going up grade at a kind of dog trot, without a heavy load, and was driving one horse. I had a lantern right in front of my footboard that wasn't very large, and I could see the ground by the light. I was driving on Elm Street in the outward bound track, on account of the snow and ice; it was the safest place I had. I was driving a very slow horse. All of a sudden I turned my horse to the right and the first thing I knew I was struck and landed right up to the right of my horse. I would say that, when I saw what I took to be the headlight of what appeared to be a car, it was ten or twenty yards — ten or fifteen yards — away. I should put it at about half way the distance across the court room. The car appeared to be going at a very high rate of speed and I should say went two lengths after it struck. I say it struck the hub of my left forward wheel, because I saw the mark on the hub. The curve turned there — going out the curve turned to the left, and I was right on the sharp part of the curve. There was no light on the street except one incandescent light about three hundred and sixty feet ahead of the place where the accident happened and it was very dark. I heard no gong on the car, though I listened

for one all the time. The axle of my wagon is about one and a half feet wider than the car track, outside of the hub. Assuming that my wheel on the right side is going along the track in the rail, my other wheel would be about a foot and a half outside the other rail of the outbound track. There are no houses along near the place where the accident happened. I was thrown off my wagon."

On cross-examination he testified that when he "pulled to the right" "the wagon slid on the rails," "slewed around and slewed into the car." "The rails are a little higher than what the street is. . . . I was pulling out to the right, and the wheel slid along on the rail, . . . sticking in towards the car, . . . kind of sideways." There was other evidence as to the weather and condition of the street and the distance one could see.

It is a case of collision between two travellers, each using the highway; and the right of each as such ended where that of the other began. Ordinarily such cases are for the jury, and we think that this is no exception.

On the evidence the questions whether the plaintiff seasonably saw the car, whether he with due promptness tried to turn out, and whether he was careful in the manner in which he made the attempt, whether the motorman was duly observant of the approach of the team, whether he took all due precaution by lessening the speed of the car, or otherwise, to avoid a collision, as well as the general questions whether in these or other material respects either party was careful or careless, were all for the jury.

By the terms of the report upon which the case is before us, there should be judgment for the plaintiff for \$500; and it is

So ordered.

MICHAEL E. MURRAY vs. JOHN HAYNES & trustee,
JOHN AKINS, claimant.

Suffolk. November 22, 1912. — January 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Order. Trustee Process.

In an action of contract brought by trustee process, where the answer of the trustee admitted the possession of a sum of money due to the defendant and such fund in the hands of the trustee was claimed by a certain claimant as due to him under an order in writing signed by the defendant and addressed to the trustee, ordering the payment to the claimant of all money due to the defendant for teaming sand and old brick to a certain church, it was *held*, that the questions whether the order was given by the defendant to the claimant before the service of the writ upon the trustee, whether at the time it was given any money was due from the trustee to the defendant for teaming sand and old brick to the church named in the order, and whether at the time of the service of the writ upon the trustee any of the money still in the hands of the trustee was the money covered by the order, and, if so, how much of it, were questions of fact to be submitted to the jury upon the evidence in the case.

CONTRACT to recover \$97.50 for work done for the defendant from March 1 to April 15, 1909, according to an account annexed, the Holt-Fairchild Company, a corporation, being summoned as trustee. Writ in the Municipal Court of the City of Boston dated May 24, 1909.

The trustee filed an answer admitting that it had in its hands at the time of the service of the writ goods, effects and credits of the defendant to the amount of \$83.97. John Akins of Chelsea filed a claim to the fund in the hands of the trustee, annexing a copy of the following order:

"Holt-Fairchild Co. "Chelsea, Mass. April 19, '09.

"Please pay to bearer John Akins all money due me for teaming sand and old brick to First Baptist Church, Chelsea, Mass. to date & oblige

John W. Haynes."

On appeal to the Superior Court the case was tried before *Hitchcock, J.* The only issue raised was between the plaintiff

and the claimant Akins as to which of them was entitled to the fund in the hands of the trustee. The questions to which the evidence related are stated in the opinion. At the close of the evidence the plaintiff asked the judge to make the following rulings:

"1. Upon the whole evidence the plaintiff is entitled to a verdict.

"2. That there is no evidence that, at the time of the service of the writ upon the trustee Holt-Fairchild Company, there was any amount due from the Holt-Fairchild Company to the defendant John Haynes for teaming sand and old brick to First Baptist Church, Chelsea, Mass., and therefore the plaintiff is entitled to a verdict."

The judge refused to make either of these rulings and ruled that there was sufficient evidence for the jury to consider, and allowed the case to go to the jury upon the evidence. The jury returned a verdict for the claimant in the sum of \$83.97; and the plaintiff alleged exceptions.

R. W. Frost, for the plaintiff.

W. F. Porter, for the claimant.

HAMMOND, J. This is a plain case. Without reciting the evidence in detail it is sufficient to say that the questions, whether the order was given by Haynes to the claimant before the service of the writ upon the Holt-Fairchild Company, the alleged trustee, whether at the time it was given there was any money due from the company to Haynes "for teaming sand and old brick," to the church named in the order, and whether at the time of the service of the writ upon the company any of the money still in its hands was the sum covered by the order, and, if so, how much, were questions of fact and they were properly submitted to the jury.

Exceptions overruled.

WILLIAM SPRAGUE vs. GENERAL ELECTRIC COMPANY.

Berkshire. November 26, 1912. — January 28, 1913.

Present: RUGG, C. J., MORTON, BRALEY, & SHELDON, JJ.

Negligence. Agency. Practice, Civil. Conduct of trial. Evidence, Opinion: experts.

In an action for personal injuries from being hit by the head of a hammer that came off the handle, when the plaintiff, in accordance with a general instruction of his employer and at the request of an electrical engineer of the defendant, was assisting such engineer in tightening bolts by holding a wrench on one of the bolts while the engineer struck the handle of the wrench with the hammer in order to set the bolt more tightly, there was nothing to show that the heads of such hammers came off frequently or that their coming off involved great danger. The plaintiff testified that he never had tightened bolts in that way before, and there was evidence that it was forbidden in the works of the plaintiff's employer, but there also was evidence that this method of tightening bolts was used by a great many electrical engineers. *Held*, that it was a question for the jury, whether the plaintiff was negligent in thus assisting in tightening the bolt, or whether in doing so he assumed the risk of an injury from the head of the hammer coming off.

In an action for personal injuries from being hit by the head of a hammer that came off the handle when the hammer was being used by a servant of the defendant, there was evidence that the head of the hammer came off either because it was not wedged properly or because it was not wedged at all. The plaintiff testified that immediately after the accident the defendant's servant showed the handle and the head to him and that there were no wedges in the handle. Another witness testified that the head was likely to come off if it was wedged on improperly. *Held*, that the questions whether the hammer was defective and whether in the exercise of due care the defendant's servant should have discovered the defect were for the jury, and that, if the defendant's servant was negligent in using the hammer, the defendant was liable for the injury caused by such negligence whether the hammer was furnished by the servant himself or by the defendant.

In an action for personal injuries from being hit by the head of a hammer that came off the handle, when used by a servant of the defendant whom the plaintiff was assisting, there was evidence that the defendant was engaged in installing an engine in a power house of the plaintiff's employer and that the plaintiff and his fellow employees had been told by their employer to assist the defendant's men all they could when they had a few minutes to spare, that the plaintiff, acting in pursuance of this general order, responded to a request of the defendant's servant to assist him in tightening a bolt by holding a wrench on the bolt while the defendant's servant struck the handle of the wrench with the hammer and that at the fourth blow thus struck by the defendant's servant the head of the hammer came off and hit the plaintiff, that the defendant's

servant whom the plaintiff was assisting had been sent by the defendant for the purpose of completing the installation^a of the engine and that he was the person in charge of the work and the only one there representing the defendant in connection with it. *Held*, that the question, whether the plaintiff when assisting in tightening the bolt became a servant of the defendant so that his injury was caused by the act of a fellow servant, was one to be submitted to the jury with proper instructions. *Held, also*, that, under the circumstances shown, the authority of the defendant's servant to ask the plaintiff for temporary assistance fairly could be presumed, and that, in rendering such assistance for the purpose of facilitating the work of his employer, the plaintiff did not cease to be the servant of such employer or lose his right to be protected from the carelessness of the defendant's servants.

Where the servant of one employer is assisting the servant of another in doing certain work, in order to make such assistant the servant of the person whose work he is doing it is necessary either that he should assent expressly to a change of employers or that he should have had such notice and knowledge of the circumstances that his assent to the changed relations is to be presumed as matter of law from his conduct.

On an exception to the refusal of a presiding judge to strike out certain questions and answers that were not heard by the counsel for the excepting party, which was treated as waived because it was not argued, it was *said* that the matter clearly was one within the discretion of the presiding judge.

In an action for personal injuries from being hit by the head of a hammer that came off the handle, a witness, who is qualified as an expert, may be asked the question, "What causes a hammer to fly off the handle when the same is being used in the usual and proper way?" and may answer, "It would be improperly wedged. The continual striking would jar it off," it being within the discretion of the presiding judge to admit the question and answer if he thinks that they will or may be of assistance to the jury.

MORTON, J. This is an action of tort at common law for personal injuries caused by alleged negligence on the part of a servant of the defendant. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions in regard to the admission of evidence, the refusal of the presiding judge* to give certain instructions requested by the defendant, and to portions of the charge.

At the time of the injuries complained of the defendant company was employed in installing in the power house of the Pittsfield Electric Company an engine for which that company had contracted with the defendant, and which, according to the contract, the defendant was to install and start "and place in good operative condition." The contract also required the defendant to furnish a competent man to superintend the work. It had had an

* *McLaughlin, J.*

engineer there for that purpose, but at the time of the accident he had gone away and his place had been taken, or there was evidence tending to show that it had, by a man by the name of Leishman. There was evidence tending to show that the work of installation had not been entirely completed. As incident to and a part of that work, Leishman was engaged in tightening bolts to stop some small leaks in the steam chest. To assist him in doing that Leishman requested the plaintiff, who was an assistant engineer in the employ of the Pittsfield company, to hold a wrench on one of the bolts while he struck the handle in order to set the bolt up more tightly. Leishman struck three blows with the hammer. At the fourth blow the head of the hammer came off and hit the plaintiff, causing the injuries complained of. There was evidence tending to show that the defendant was behind in the performance of its contract, and that in order to hasten the work the plaintiff and other employees of the Pittsfield company had been told by those in charge of that company to assist the defendant's men all they could when they had a few minutes to spare, and that it was pursuant to orders thus given that the plaintiff responded to Leishman's request to assist him. It did not appear, if material, that these orders were given at the request of or were known to the defendant company except as might be inferred from the acceptance of the assistance that was rendered.

The question of the plaintiff's due care was plainly, we think, for the jury. There was nothing in what he was requested to do that appeared to involve any danger. The hammer itself was a simple tool, and, though the heads of hammers sometimes come off, there was nothing to show that it happened so frequently, or was liable when it did happen to be attended by such dangerous consequences as to warrant us in holding as matter of law that the plaintiff was negligent in not examining it. The plaintiff testified that he never had tightened bolts in that way before, and there was evidence that it was forbidden in the plant of the Pittsfield company. But there was also evidence that this method was used by a great many electrical engineers, and it was for the jury to say whether the plaintiff was negligent in using it. For the same or similar reasons it could not be ruled as matter of law that he assumed the risk.

There was evidence that the head came off either because not

properly wedged on to the handle or because it was not wedged at all. The plaintiff testified that immediately after the accident Leishman showed the handle and the head to him, and there were no wedges in the handle. Another witness testified that the head was liable to come off if improperly wedged on. It was for the jury to say whether the hammer was defective and whether in the exercise of due care Leishman should have discovered the defect. It is immaterial whether the hammer was furnished by Leishman himself or by the defendant. In either case the defendant is liable for the injury caused by Leishman's negligence in using it. See *Crimmins v. Booth*, 202 Mass. 17, 24, 25.

It could not be ruled as matter of law that the plaintiff was a volunteer or a stranger in assisting Leishman. He was acting, or could be found to have been acting, under the orders of his employer and could not, therefore, be said to be either a volunteer or a stranger. Neither could it have been ruled as matter of law that he was a fellow servant of Leishman in the employ of the defendant company, or that Leishman was a fellow servant with him in the employ of the Pittsfield company, or that he was a fellow servant with Leishman of both companies. There was nothing to show that Leishman was in the employ of the Pittsfield Company, and it could not therefore have been ruled that the plaintiff was a fellow servant with Leishman in the employ of that company or of both corporations; and it would have been error for the presiding judge to have instructed the jury, as requested by the defendant, that they could so find. Whether the plaintiff became a servant of the defendant and a co-employee of that company with Leishman was left to the jury under instructions to which we think no just exception can be taken. To constitute the plaintiff a servant of the defendant it was necessary either that he should expressly assent to a change of employers, or should have had such notice and knowledge of the circumstances that his assent to the changed relations would be presumed as matter of law from his conduct. And the jury were in substance and effect so instructed. *Berry v. New York Central & Hudson River Railroad*, 202 Mass. 197. *Beauregard v. Benjamin F. Smith Co.*, ante, 259.

The mere fact that acting under general orders from his employers to help the defendant's men he rendered assistance to Leishman at Leishman's request would not constitute him a servant of the

defendant. And the nature of the service rendered by him was such that it was or could be found to be fairly within the scope of Leishman's authority to request it. There was evidence tending to show that Leishman had been sent by the defendant for the purpose of making adjustments and completing the installation of the engine, and that he was the person in charge of that work and the only one there representing the defendant in connection with it. Under such circumstances his authority to ask such temporary or transient assistance as he might require of the plaintiff or others in the employ of the Pittsfield company could fairly be presumed. In rendering the assistance requested for the purpose of facilitating the work of his employer, the plaintiff did not cease to be a servant of the Pittsfield company or lose his right to be protected from the carelessness of the defendant's servants. *Welch v. Maine Central Railroad*, 86 Maine, 552. *Wright v. London & Northwestern Railway*, L. R. 10 Q. B. 298. *Eason v. Sabine & East Texas Railway*, 65 Texas, 577. *Street Railway v. Bolton*, 43 Ohio St. 224. *Meyer v. Kenyon-Rosing Machinery Co.* 95 Minn. 329. *Empire Laundry Machinery Co. v. Brady*, 164 Ill. 58. We see no error in regard to the instructions given or refused. *Bowie v. Coffin Valve Co.* 200 Mass. 571; 206 Mass. 305, is easily distinguishable.

We pass to the matters of evidence. The exception to the refusal of the presiding judge to strike out the questions and answers that were not heard by the counsel for the defendant has not been argued by the defendant and we treat it as waived. The matter was clearly one within the discretion of the presiding judge.

The only exception in relation to evidence which has been argued by the defendant was to allowing a witness introduced by the plaintiff as an expert to be asked, "What causes a hammer to fly off the handle when the same is being used in the usual and proper way?" and to answer, "It would be improperly wedged. The continual striking would jar it off." If the presiding judge thought that the question and answer would or might be of assistance to the jury we cannot say that he was wrong in allowing them. *Bowie v. Coffin Valve Co.* 200 Mass. 571, 578.

Exceptions overruled.

C. H. Wright, for the defendant.

J. M. Rosenthal, for the plaintiff.

GEORGE E. SPRAGUE & others vs. CAROLINE S. KIMBALL & another.

Essex. November 6, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Frauds, Statute of, Contract concerning sale of interest in land. *Equity Jurisdiction*, To compel imposing of restriction. *Equitable Restrictions*.

Where the owner of a tract of land sold certain lots from it, upon which he imposed uniform equitable restrictions, and agreed orally as a part of the consideration for the purchases to impose similar restrictions upon lots subsequently sold from his remaining land, such oral promise is a contract for the sale of an interest in or concerning lands within the meaning of R. L. c. 74, § 1, cl. 4, and cannot be enforced in equity in the absence of a memorandum signed by the party to be charged.

BILL IN EQUITY, filed in the Superior Court on December 19, 1911, by the owners of certain lots of land on Bassett Street in Lynn severally conveyed to them by deeds of the defendant Kimball, which imposed upon such lots certain equitable restrictions, to enjoin the defendant Kimball from conveying to the defendant Grossman the remaining portion of one of such lots without imposing thereon a similar restriction.

The answer, among other things, alleged that the bill was brought to enforce an alleged oral agreement relating to an interest in land and that there was no memorandum of such agreement signed by the party to be charged as required by R. L. c. 74, § 1, cl. 4.

In the Superior Court the case was heard by *Brown, J.* The terms of the restrictions and other material facts are stated in the opinion.

The judge found that the defendant Kimball, before any of the sales from the tract of land in question, established a general building scheme, applicable to the entire tract, for the development and improvement thereof; that a part of the scheme was the establishing of a restriction that no building should be erected within twenty-three feet of Bassett Street on any of the lots shown on the plan mentioned in the opinion; and that the re-

strictions were imposed for the benefit of all the lots shown on the plan. He also found that the defendant Kimball, either personally or through her agent, who was authorized to make such representations, represented and agreed in effect that lot 5 should not be sold except with the same restrictions as those imposed upon the lots sold to the plaintiffs and that the plaintiffs, in consideration thereof, purchased their lots and expended much money in the improvement thereof and the establishment of their homes thereon.

The judge made a decree for the plaintiffs granting an injunction as prayed for; and the defendants appealed.

R. L. Sisk, (*J. D. A. Healey* with him,) for the defendant Kimball.

C. N. Barney, (*H. T. Lummus & W. A. Bishop* with him,) for the defendant Grossman.

H. R. Mayo, (*W. H. Niles* with him,) for the plaintiffs.

BRALEY, J. The question for decision is whether the provisions of R. L. c. 74, § 1, that a contract for the sale of lands "or of any interest in or concerning them" must be "in writing and signed by the party to be charged therewith," requires us to reverse the decree.

The deeds poll from the defendant Kimball, hereafter referred to as the defendant, under which the plaintiffs respectively derive title to the second, third, fourth and part of the fifth lot shown on the plan which the defendant caused to be prepared and recorded, contain this clause, "The premises are conveyed subject to the following restrictions which shall remain in force for twenty years from the date hereof, viz.: — That no building shall be erected or maintained upon the granted premises within twenty-three feet of said Bassett Street, and no stable within fifty feet of said street, provided, however, that steps, bay windows, verandas, cornices and other usual projections may project into said reserved space; that no public or livery stable shall be maintained thereon; that they shall not be used for any mechanical, manufacturing or mercantile business, nor any trade or occupation offensive to a neighborhood for dwelling houses only."

The plaintiffs, even if thus restrained in the use of their own estates, did not gain a corresponding right as against their common grantor in the remaining land exhibited by the plan unless the

burden of the restrictions was annexed thereto under a contemporaneous enforceable agreement. *McCusker v. Goode*, 185 Mass. 607, 612. *Tobey v. Moore*, 130 Mass. 448. *Dana v. Wentworth*, 111 Mass. 291. *Whitney v. Union Railway*, 11 Gray, 359. *Rowell v. Satchell*, [1903] 2 Ch. 212.

The lots were sold from time to time as purchasers could be obtained, and more than three years elapsed after the first and before the last conveyance, while apparently seven years intervened between the last conveyance and the defendant's agreement for the sale of the remainder of lot 5 to the defendant Grossman without restrictions, which the bill seeks to enjoin. The plan incorporated by reference in the deeds, with the exception of the conveyance of lot 2, upon which the defendant before the transfer had built a dwelling in conformity with the building line, contains no reference to the restrictions, while the deeds are silent as to any express covenant or stipulation on the part of the defendant to the effect that in future sales similar restrictions were to be imposed. But the restrictions upon the mode of occupation as expressed in the deeds are uniform, and the judge finds that the defendant intended, and so informed the plaintiffs at the time of their respective purchases, to subject the lots as they were sold to similar restrictions for their mutual advantage and protection. It is moreover plain from the evidence that each plaintiff was induced by the defendant's promise to buy and build, being assured that the entire neighborhood would be restricted to residential purposes. It would be a forced conclusion, in view of the general scheme originated by the defendant, as shown by the plan, the deeds and the circumstances under which the plaintiffs severally bought, that the restrictions were intended as the mere reservation of personal rights to be enforced for the sole benefit of the defendant or her heirs so long as any portion of the tract remained unsold. The right invoked by the plaintiffs accordingly attached to each lot as it was granted for the mutual benefit of the grantees, although the grantor while he owned the remainder and observed the conditions of the contract of sale, could have compelled in equity a compliance with the restrictions by the lot owners or their successors in title. *Jeffries v. Jeffries*, 117 Mass. 184. *Peck v. Conway*, 119 Mass. 546. *Sanborn v. Rice*, 129 Mass. 387, 396, 397.

It is not a covenant running with the land at law, but it is an

equitable easement or servitude passing with a conveyance of the premises to subsequent grantees. *Parker v. Nightingale*, 6 Allen, 341. *Ivarson v. Mulvey*, 179 Mass. 141. *Evans v. Foss*, 194 Mass. 513. While only the mode of use is regulated and the fee passed, yet the estate is encumbered with the inherent restrictions which create an equitable, enforceable interest. *Tobey v. Mooré*, 130 Mass. 448. *Hano v. Bigelow*, 155 Mass. 341. It is settled by our decisions, that under the R. L. c. 74, § 1, and c. 127, § 3, an equitable as well as a legal interest in land must be evidenced by some sufficient instrument in writing or it is unenforceable. *Richards v. Richards*, 9 Gray, 313. *Glass v. Hulbert*, 102 Mass. 24, 32, 33. *McCusker v. Goode*, 185 Mass. 607, 612.

If the front building line, with any language indicating the nature of the restrictions, had appeared on the plan, the defendant would have been estopped to deny an implied grant with covenants coextensive with the scope of the plan, or, if by any appropriate wording of the deeds it appeared that the remaining lots as they were sold should be subject to the restrictions, the statute would have been satisfied. *Lipsky v. Heller*, 199 Mass. 310. *Sharp v. Ropes*, 110 Mass. 381, 386. *Boston Water Power Co. v. Boston*, 127 Mass. 374. *Kennedy v. Owen*, 136 Mass. 199, 203. *Beals v. Case*, 138 Mass. 138, 141. *Lowell Institution for Savings v. Lowell*, 153 Mass. 530. The proposed restrictions undoubtedly formed part of the consideration for the purchases, and each plaintiff would have had the right to demand that the defendant insert in the title deed a stipulation or covenant in accordance with the terms of sale. *McCusker v. Goode*, 185 Mass. 607, 612.

The judge, however, has found, and the evidence warranted the finding, that the agreement to restrict lot 5 rested wholly in parol, and, even if executed as to the other lots, and a small portion of lot 5, it remained wholly executory as to her ownership of the residue.

To prevent the statutory bar the plaintiffs urge, that as there has been full performance on their part, relief should be decreed or the statute would be converted into a shield for fraud, a result not countenanced by a court of equity. *Hubbell v. Warren*, 8 Allen, 173, 178. *Burns v. Daggett*, 141 Mass. 368. But the mere non-performance of an oral contract, within the statute which is

pleaded, as in the case at bar, and where no relation of trust and confidence exists, does not constitute fraud. *Brightman v. Hicks*, 108 Mass. 246. *Campbell v. Dearborn*, 109 Mass. 130, 140. *Ahrend v. Odiorne*, 118 Mass. 261, 268. *Dunphy v. Ryan*, 116 U. S. 491. Nor did the plaintiffs, on whom and not on the defendant the burden of part performance rests where this ground for relief is sought, by taking title, entering into occupation and making improvements on their own estates in reliance upon the parol agreement, acquire any legal or equitable interest in the defendant's remaining land. *Williams v. Carty*, 205 Mass. 396. *Caton v. Caton*, L. R. 1 Ch. 137. *Graves v. Goldthwait*, 153 Mass. 268, 269. *Low v. Low*, 173 Mass. 580, 582. *Sarkisian v. Teele*, 201 Mass. 596. The suit cannot be maintained, and the bill must be dismissed.

Ordered accordingly.

JAMES F. CAVANAUGH vs. MERRIMAC HAT COMPANY.

Essex. November 6, 1912. — January 29, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Scire Facias. Trustee Process.

In an action of *scire facias* on a judgment by which the defendant has been charged as trustee in an action brought by trustee process, the defendant should be placed in no worse position than if he were defending an action brought against him by the defendant in the trustee process for the collection of the alleged debt by reason of which he has been adjudged a trustee, and if, because of pending actions brought by third persons against such trustee affecting the amount and the existence of his indebtedness to the defendant in the trustee process, the state of the account between them cannot be ascertained, there must be a judgment for such trustee as the defendant in *scire facias*.

SCIRE FACIAS on a judgment by which the defendant was charged as trustee. Writ dated December 7, 1911.

In the Superior Court the case was submitted to *Hall, J.*, upon an agreement of the parties that the allegations of fact contained in the plaintiff's writ and the defendant's answer were true, and that the court might draw all reasonable and proper inferences therefrom. Such facts are stated briefly in the opinion.

The defendant asked the judge to make the following rulings:

"1. That no judgment in this action can be rendered against the Merrimac Hat Company until the liability of the Merrimac Hat Company in the cases of *Edward Perkins Lumber Company vs. Merrimac Hat Company*, *True vs. Merrimac Hat Company*, and *Inhabitants of Amesbury vs. Merrimac Hat Company* has been finally determined.

"2. That upon all the evidence the plaintiff is not entitled to recover against the defendant in this case."

The judge ordered that judgment be entered for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

C. I. Pettingell, for the plaintiff.

H. L. Boutwell, W. H. Hastings & F. P. Miller, for the defendant.

RUGG, C. J. This is an action of *scire facias* on a judgment in which the defendant was charged as trustee. Its liability was not made absolute thereby, but it may in this proceeding set up any matter of defense which would have been available in an action against it by its alleged creditor, the original defendant. *Shawmut Commercial Paper Co. v. Cram*, 212 Mass. 108. Before the service of the plaintiff's trustee writ upon it, the defendant had entered into three contracts with Dearborn Brothers and Company, defendants in the trustee action, by which the latter agreed to construct and enlarge buildings for it. The builders entered upon the performance of these contracts, but failed to complete them by reason of financial embarrassments. At their request and expense the defendant had completed the contracts. At the time of the service of the plaintiff's trustee writ upon this defendant there was due from it to the builders \$392.67, provided it was not held liable in two actions brought against it by persons who alleged that it was liable for large amounts of materials furnished to the builders in the performance of the contracts. These actions are pending and undecided, and if the defendant should be held liable in these actions nothing would be due to the present plaintiff.

It is a general rule, touching the liability of one summoned as trustee under the trustee process, founded upon reason and amply supported by authority, that he should be placed in no worse position than if the principal defendant had brought action against

him directly. Ultimate justice between the parties must be considered upon broad and equitable grounds. The plaintiff can hold in the hands of the trustee only such sum as is finally due from him to the chief defendants after all just allowances have been made respecting their mutual rights and obligations. He is a stakeholder, having no interest in the action in which he is summoned as trustee, and as such is entitled to the protection of the court. Any defense is open to him which would be available in an action against him directly by the original defendants, his alleged creditors. *Smith v. Stearns*, 19 Pick. 20. *Bennett v. Caswell*, 7 Gray, 153. *Eddy v. O'Hara*, 132 Mass. 56. *Nutter v. Framingham & Lowell Railroad*, 132 Mass. 427. *Lannan v. Walter*, 149 Mass. 14. R. L. c. 189, § 25. If the defendant should be found liable to pay the obligations sought to be fastened upon it by those who had furnished materials to the defendants in the trustee action, there would be manifest injustice in compelling it to pay in this proceeding. It would be in a distinctly worse position than if action had been brought against it directly by its alleged creditor. Its obligation to pay on these outside actions became fixed, if at all, at the time they were brought, which was before the institution of this proceeding.

It is impossible to ascertain at present the exact state of the account between this defendant and the defendant in the trustee process. Hence there must be judgment for the defendant. R. L. c. 189, § 48. *Guptill v. Ayer*, 149 Mass. 49.

Exceptions overruled.



CHARLES L. BURNHAM vs. ULYSSES G. HASKELL.

Essex. November 6, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Dismissal for lack of prosecution. *Superior Court. Rules of Court.*

If, under Rule 60 of the Superior Court, which provides for a calling of the civil docket after notice to parties and that "all suits which have remained without action for two years may be dismissed," such a suit is called and by order of the presiding judge the docket entry is made, "April sitting or dismissed," there is

no absolute dismissal of the suit, and, if no further order of dismissal is made and the parties by mutual consent with the approval of the court postpone the trial of the case beyond the April sitting, the case remains pending during such postponements.

TORT for conversion. Writ in the First District Court of Essex dated October 28, 1905.

On appeal to the Superior Court the case was entered on the first Monday of March, 1907, and remained without action until December 23, 1910. Previous to the December, 1910, sitting of the court in Essex County, the clerk gave notice of a calling of a portion of the civil docket under Rule 60 of the court on December 23.

Rule 60 of the Superior Court reads as follows: "The civil docket or such part thereof as the court shall direct, shall be called in each year, and after such notice, by publication, or otherwise, as the court may determine, all suits which have remained without action for two years may be dismissed, unless cause is shown to the contrary."

On December 23, the case was called and the presiding judge ordered the docket entry to be made, "April sitting or dismissed." The case was not disposed of during the April, 1911, sitting. At the request of the plaintiff it was placed on the trial list for the December, 1911, sitting, and, after it was called for trial at that sitting before *Fessenden, J.*, and after one juror had been drawn, the defendant refused to proceed with the trial on the ground that the case had been dismissed.

The judge ruled that the order of December 23, 1910, meant "that the case was to be disposed of during the April, 1911, sitting, or dismissed," and found the following facts: The case was on the trial list for April, 1911. During that sitting the case was postponed from time to time by agreement of parties. At times the plaintiff might have been non-suited for failure to appear but that the defendant allowed the case to stand, and at times the defendant might have been defaulted for failure to appear and the plaintiff allowed the case to stand. The case was not disposed of during the April sitting. It was placed upon the trial list for the November, 1911, sitting. During November, 1911, the case, having been reached, by agreement of both parties was postponed until a certain day thereafter. Later, the case having come on

to be tried, both parties agreed that it might be postponed until a certain day if the presiding judge approved. The judge approved this last postponement. Solely upon the foregoing findings and not otherwise the judge found that the parties had treated the case as if it had not been dismissed, and that there was no record other than that of December 23, 1910, that it had been dismissed. Accordingly the parties were directed to proceed with a trial, both sides being present with their witnesses.

There was a verdict for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

A. P. White, for the defendant.

E. M. Sullivan & G. H. W. Hayes, for the plaintiff.

BRALEY, J. The order entered at the calling of the docket was provisional, that if not tried at the next April sitting the case should be dismissed. It appears from the memorandum of decision, which is conclusive as to the facts, that although put on the trial list, yet when reached the case was postponed by the parties, and, not having been disposed of, it was placed on the trial list for the following November sitting. When reached at this sitting after having been twice continued to a day certain by agreement of parties and with the approval of the court, the plaintiff recovered a verdict.

The defendant contends, that under the order of dismissal and Rule 23 of the Superior Court the case went to judgment on the first Monday of July, 1911. *Shawmut Commercial Paper Co. v. Cram*, 212 Mass. 108. But the dismissal was not absolute, and with the approval of the court the parties treated the case as still pending from sitting to sitting. The order of dismissal consequently did not become automatically operative, and, as the presiding judge at the request of the plaintiff could order the case tried, no error of law is shown. *Karrick v. Wetmore*, 210 Mass. 578.

Exceptions overruled.

EDWARD E. ELDER vs. FEDERAL INSURANCE COMPANY.

Essex. November 7, 1912. — January 29, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DE COURCY, JJ.

Insurance, Fire, Of automobile. Contract, Implied in law.

The provision of St. 1907, c. 576, § 21, to the effect that no misrepresentation or warranty made in the negotiation of a policy of insurance by the assured shall be deemed material or avoid the policy unless it is made with actual intent to deceive or unless the matter misrepresented increases the risk of loss, has no application to a warranty contained in the body of a policy.

If the owner of an automobile insured for a year against loss or damage by fire by a policy, which contained a provision warranting that the automobile would not be used for carrying passengers for hire or be leased and that, if the warranty were violated, the policy would "immediately become null and void," six months after the policy was issued permits his son to use the automobile to carry passengers for hire, the policy at once ceases to be in force, and the owner cannot recover upon it for damage to the automobile by a fire occurring eleven and a half months after it was issued; nor is he entitled to a return of any premium paid upon the policy, as the policy had attached and only by his own act was he deprived of its full benefit.

CONTRACT upon a policy of insurance of the plaintiff's automobile against loss or damage caused by fire. Writ dated March 12, 1910.

The policy was for one year from March 31, 1908, and contained as one of its terms the following: "17. Warranted by the assured hereunder that the automobile hereby insured shall not be used for carrying passengers for compensation or rented or leased during the term of this policy; and in the event of violation of this warranty this policy shall immediately become null and void."

The provision of St. 1907, c. 576, § 21, referred to in the opinion, is as follows: "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss."

In the Superior Court the case was tried before *Fessenden, J.* In his opening statement to the jury the plaintiff's counsel offered to prove in substance that previous to the issuance of the policy the agent of the defendant who dealt with the plaintiff was told by the plaintiff that it was possible his son might use the car during the summer, obtaining some compensation from passengers, although the car would be rented but little, and that the agent assured the plaintiff that that would make no difference to the defendant; that the plaintiff thereupon agreed to take out the insurance and that shortly afterwards the agent delivered to the plaintiff the policy of insurance sued on and received from the plaintiff the premium amounting to \$62.50; that the plaintiff at no time intended to deceive the defendant; that on August 1, 1908, the plaintiff's son with the plaintiff's knowledge and consent carried passengers on a trip of four or five weeks to the White Mountains and received compensation therefor; that in the following September the plaintiff's son carried three or four passengers to the Brockton Fair, returning the same day, and received compensation therefor; that on March 16, 1909, the automobile was damaged by fire, and that the plaintiff gave the defendant due notice thereof. The plaintiff and the defendant agreed that the amount of damage done to the automobile was \$250.

The judge ruled as a matter of law that, upon the facts which the plaintiff offered to prove, he was precluded from maintaining his action, ordered a verdict for the defendant, and reported the case for determination by this court, it being agreed by the parties that if the ruling was wrong the verdict in favor of the defendant should be set aside and judgment entered for the plaintiff in the sum of \$250, unless this court should rule that the policy became null and void on August 1, 1908, that, if the court should so rule and should be of the opinion that the plaintiff ought to recover from the defendant a return of a portion of his premium, judgment should be entered for the plaintiff in the sum of \$41.67.

H. R. Mayo, for the plaintiff.

R. Homans, (*S. G. Barker* with him,) for the defendant.

BRALEY, J. The plaintiff as the insured, "warranted . . . that the automobile hereby insured" against loss or damage by fire "shall not be used for carrying passengers for compensation or rented or leased during the term of this policy; and in the event

of violation of this warranty this policy shall immediately become null and void." Having been inserted in the body of the policy the warranty was not dependent upon the negotiations embodied in the application and final issuance of the contract of insurance, and the St. of 1907, c. 576, § 21, is inapplicable. *Barker v. Metropolitan Life Ins. Co.* 188 Mass. 542. *Everson v. General Accident, Fire & Life Assurance Co.* 202 Mass. 169. If the automobile was used for the transportation of passengers for hire the plaintiff stipulated that the policy should be void, and the only remaining question is, whether upon the evidence it could be ruled as matter of law that the warranty had been broken. It was agreed by the parties, that with the plaintiff's knowledge and consent the plaintiff's son, for compensation which he received and retained, made trips with the automobile for the accommodation of tourists and passengers, and, this use having been permitted by the plaintiff, there was a violation of the warranty at common law, and whether the risk had been increased is immaterial. *Barker v. Metropolitan Life Ins. Co.* 188 Mass. 542. *Kidder v. United Order of the Golden Cross*, 192 Mass. 326. The policy therefore was not in force when the automobile was damaged by fire, and the plaintiff cannot recover for the loss.

Nor is he entitled to a return of any part of the premium. The policy attached, and while the premium covered the life of the policy if its terms were complied with by the insured, the plaintiff could not through his voluntary breach deprive the defendant, who is without fault, of the full benefit of the contract. *Taylor v. Lowell*, 3 Mass. 330. *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56.

Judgment for the defendant on the verdict.

ROBERT C. COOK vs. FRANK E. NEWHALL.

Essex. November 7, 1912. — January 29, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Res ipsa loquitur.

It is not necessary for a presiding judge to state to the jury the established rule, that the unexplained automatic starting of a machine when it ought to be at rest is evidence of a defect or want of repair, where evidence relating to a simple device that has been brought into the court room and inspected affords an explanation of the starting of the machine, where definite causes of starting have been discussed before the jury and where the judge in his charge assumes that the plaintiff relies on such a definite cause and the plaintiff does not except to this assumption.

TORT for personal injuries sustained when the plaintiff was in the employ of the defendant and was operating a machine known as a corn cutter in cutting corn stalks into lengths of one half or three quarters of an inch. Writ dated October 15, 1907.

In the Superior Court the case was tried before *Lawton, J.* It was conceded that the defendant owned and furnished the machine and employed the plaintiff to operate it. The machine was called the "Hero Self Feed Cutter." There were four spiral knives clamped to the knife shaft, and power from the engine was transmitted to this shaft by a belt. Back of the knives were two iron rollers between which the corn stalks passed, and as they passed between the rollers they were cut off by the knives, which revolved downward toward the rollers. The corn stalks were placed on a table or apron some ten feet in length, and were brought between the rollers by the motion of this apron. The lower roller shaft had a wheel on the left side, the teeth of which fitted into the teeth of a wheel on the knife shaft. An iron chain connected the end of the roller shaft with a shaft which passed under the apron. The last mentioned shaft had a wheel upon which were teeth fitting into the links of a chain which was a part of the apron and moved the apron. When the machine was running, the clamps on the roller wheel fitted together. A lever was at the left of the machine out-

side the table. When the machine was running this lever was close to the side of the table. When the lever was pushed to the left as far as it would go it dropped into a notch designed to hold it, and when the lever was in this position it separated the clamps and instantly stopped the rollers from revolving, although the knife shaft and knives continued to revolve.

The plaintiff testified that in the course of his employment he stood on the right hand side of the machine and with his hands thrust the corn stalks between the rollers; that while he was thus employed the rollers became clogged to such an extent that the stalks would not pass between them; that the plaintiff threw the lever to the left and into the notch and thereby stopped the rollers from revolving and the apron from moving and then proceeded to pull out the stalks from between the rollers from the rear; that while he was so engaged the lever flew back of itself and caused the rollers to revolve and the apron to move and that as a result of this the plaintiff's right hand was drawn between the rollers and came in contact with the knives and his fingers were cut off and his hand was so mangled and crushed that amputation of it became necessary. There was evidence which tended to show that on other occasions before the accident the machine had started up automatically, but this was contradicted by witnesses for the defendant. The defendant, who was called as a witness by the plaintiff, testified that he never knew or heard of the machine starting automatically.

The plaintiff testified that at the time of the trial he was thirty-seven years of age; that he was born and brought up on a farm and that his occupation always had been that of a farmer and teamster; that before entering the employ of the defendant he had worked for three seasons upon a similar machine and was familiar with its operations. The only evidence in the case tending to show that the machine started up automatically on the day of the accident after it had been stopped came from the plaintiff himself. The defendant testified that at the time of the accident he had been the owner of the machine for five years; that it had been bought as a new machine from a reputable dealer and that it had been used only about three days in the autumn of each year for the purpose of cutting corn for ensilage. At the trial, the machine was brought into the court and its various parts were

inspected by the judge and the jury, particularly the lever and the slot.

In regard to the inferences to be drawn from the single fact of the automatic starting of the machine, if it did so start, the judge charged the jury as follows: "There has been some reference made both in the opening and closing argument of the plaintiff to the effect that the mere happening of the accident is in itself some evidence of a defect and some evidence of negligence on the part of the defendant. In this case I cannot give you that instruction — whether it is material here or not remains to be seen." The charge of the judge is described further in the opinion.

The plaintiff excepted to all those portions of the charge which stated in substance that the automatic starting of the machine was not evidence of negligence.

In the course of the trial the following question was asked the plaintiff by his counsel: "Whether or not you had ever seen other similar machines to this start from a dead stop?" The defendant objected to this question and it was excluded. To the exclusion of this question and its answer the plaintiff excepted. The plaintiff proposed to show by the answer to this question that he had not seen other machines similar to this start from a dead stop.

Also in the course of the trial the following question was asked the plaintiff by his counsel: "Whether or not you appreciated the danger of this machine starting from a dead stop automatically?" The defendant objected to this question, and it was excluded. To the exclusion of this question and its answer the plaintiff excepted. The plaintiff proposed to show by the answer to this question that he did not appreciate such danger.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. C. Batchelder, (N. D. A. Clarke with him,) for the plaintiff.

J. P. Sweeney, for the defendant, submitted a brief.

RUGG, C. J. The unexplained automatic starting into motion from a state of rest of a machine when according to the mechanical laws of its construction it ought to remain still is not only evidence of a defect or want of repair in the machine, but also of negligence of the owner or person in charge of it in failing to discover and remedy such defect or want of repair. This is firmly established. *Ryan v. Fall River Iron Works*, 200 Mass. 188. *Chi-*

uccariello v. Campbell, 210 Mass. 532. The whole body of the evidence may be such that no particular negligence can be found, and yet the accident may indicate some negligence, the details of which cannot be ascertained. *James v. Boston Elevated Railway*, 204 Mass. 158, 162. It is true also that "an unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it." *Cassady v. Old Colony Street Railway*, 184 Mass. 156, 163. *Galligan v. Old Colony Street Railway*, 182 Mass. 211. *Parsons v. Hecla Iron Works*, 186 Mass. 221, 223, 224. *McNamara v. Boston & Maine Railroad*, 202 Mass. 491, 497.

But it is only the unexplained automatic acting of machinery when it should remain at rest which gives occasion for the application of the rule. Instances may arise when the whole situation is fully disclosed, and the starting may appear definitely as due to a particular cause or to one of several distinct and defined causes, and all other causes, conjectural or uncertain in their nature, may be excluded upon evidence which is not open to dispute. Or a plaintiff may place his ground of recovery upon a special cause, and not rely upon the automatic starting. This is not the common case. But *Ross v. Pearson Cordage Co.* 164 Mass. 257, illustrates the application of this aspect of the rule. If this is the posture of the case, then the automatic starting of the machine as an unexplained cause of injury does not remain as evidence of a tortious act, but is resolved plainly and without doubt into its component parts, and one or more of these parts must appear to be tortious before there can be recovery. The doctrine of *res ipsa loquitur* has no application where every circumstance and fact is in evidence. *Gibson v. International Trust Co.* 177 Mass. 100, 103. Indeed, that doctrine arises only "in the absence of explanation or other evidence which the jury believe" as a rational inference that a certain event does not commonly happen except by negligence. *Graham v. Badger*, 164 Mass. 42, 47.

The plaintiff in the case at bar apparently did not rely upon the mere starting of the machine, but pointed to the slot where the shipper was held as the specific difficulty. Although this is not stated with unequivocal clearness, it is fairly to be inferred from the whole of the charge, which proceeds upon the assumption that the plaintiff "goes forward and says . . . the place for you

to look is at that slot" and not that somewhere about the mechanism as a whole something is the matter which he did not undertake definitely to point out. No exception was taken to this part of the charge. The only exception saved was "to all those portions of said charge which stated in substance that the automatic starting of the machine was not evidence of negligence."

The trial judge instructed the jury that "This is not a case, as it seems to me, of an accident happening unexplained." He then proceeded to describe the machine briefly as disclosed by the evidence. It was a corn cutter operated by steam power. It was brought into the court room and exhibited to the judge and the jury, and they saw everything about it, except that it was not coupled to an engine. The plaintiff was an experienced and intelligent workman of mature years. The slot which held the shipper seems to have been a simple device, whose operation was easy of comprehension. The machine itself was comparatively new, had been bought from a reputable dealer, and had been used in the aggregate only a few days. The trial proceeded apparently on the theory that the shipper, which controlled the starting and stopping of a part of the machine, came out of a slot, into which the plaintiff had put it, and thereby started the machinery. The causes suggested in argument and the only ones that had been suggested (according to the charge of the judge) were (1) that the shipper was not put squarely back into the slot; (2) that the edge of the slot was worn down, so that it was not held firmly; or (3) that it jarred out by the mere operation of the machinery without the existence of any defect which could be discovered by inspection and that it had so started before the plaintiff's injury. So far as can be judged from the printed record, considerable emphasis was placed upon the cause last mentioned. With reference to these matters the jury were instructed that if the first was the cause, the defendant could not be found negligent; that if the second was the cause, he could be found negligent, and that if the third was the cause he would be found negligent if the shipper had jarred out before, but not if this was the first time it had jarred out.

As applied to the issues which appear to have been raised at the trial, there was no error in the charge. While generally it would be the duty of a trial judge to say that the unexplained automatic

starting of a machine from a position of rest was evidence of negligence in its maintenance or care, yet in the case of a simple device which has been brought into the court room and has been examined, where definite causes of starting have been discussed and tried and the judge rules as the basis of his charge that the issue is not the unexplained automatic starting of a machine and assumes as a fact that everything in connection with the slot, to which alone attention was directed, was open to the jury and had been explained by evidence and this without specific exception, it cannot be said that the plaintiff shows that a wrong has been done him. Any statement of law upon the topic of automatic starting, however sound in itself, became inapplicable. If the statement of the judge, that everything about the slot, which was the sole point of attack by the plaintiff, was open and obvious, was not according to the contention of the plaintiff, then exceptions should have been taken to it. It was not enough for him to take the general exception, because on the facts stated by the judge it was not necessary to say that the automatic starting of the machine was evidence of the defendant's negligence. There is nothing in the record to show that the statement of facts made by the judge was not correct. The sentences in the charge, which taken by themselves appear obnoxious to the rule of *Ryan v. Fall River Iron Works* and *Chiuccariello v. Campbell*, are to be read, and must have been understood by the jury, in connection with the questions which in fact had been tried, and which were stated by the judge.

The plaintiff does not show that he has been harmed by the rulings in the rejection of evidence, and his exceptions in this regard must be overruled. It was of no consequence upon any issue, so far as appears, that the plaintiff had not seen other similar machines start from a dead stop. The bald inquiry as to the plaintiff's appreciation of danger does not seem to have been material. See *Jedfrey v. Boston & Northern Street Railway*, 198 Mass. 232, 235. Appreciation of danger is a composite matter dependent upon knowledge of facts and the results likely to follow them.

Exceptions overruled.

CHANDLER GRAIN AND MILLING COMPANY vs. JOHN SHEA.

JOHN SHEA vs. CHANDLER GRAIN AND MILLING COMPANY.

Essex. November 7, 1912. — January 29, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DeCOURCY, JJ.

Sale, What constitutes. *Custom*. *Evidence*, Relevancy and materiality, Admissions by conduct, Self serving acts. *Damages*, in contract.

A milling company made the following contract in writing with a customer: "We hereby confirm sale to you of" certain meal. "It is understood that you are to have free storage for any portion of this meal for the remainder of this year; that it is at your risk as far as fire is concerned; that you are to give your notes in settlement . . . with interest, with the privilege of renewing them or any portion of them on which the meal they represent is unsold." At the trial of an action by the customer against the company for breach of the contract, there was no evidence that at the time the contract was made the company had on hand the quantity of meal specified therein. No meal was at any time marked or set apart for the customer. Before all of the meal had been called for by the customer, the company's mills were destroyed by fire and the company refused to complete the delivery of the meal called for by the contract. *Held*, that no title to the meal had passed to the customer before the fire, so that it was not the plaintiff's meal that was destroyed and the defendant might be found liable for refusing to complete the delivery of the meal called for by the contract.

At the trial of an action of contract against a milling company for failure to perform a contract for the sale by the defendant to the plaintiff of a certain quantity of meal, the plaintiff "to have free storage for any portion of" the meal for a specified time at his own risk as far as a fire was concerned, there was no evidence that at the time of the making of the contract the defendant had on hand the quantity of meal called for by the contract. A fire destroyed the defendant's mill before the plaintiff had called for the quantity of meal designated in the contract. The defendant contended that there had been a delivery to the plaintiff and offered evidence of a trade custom to the effect that corn was spoken of as meal, and that when meal was sold it was sold in the grain with the understanding that it should be ground into meal shortly before delivery. The evidence was excluded. It appeared that no meal or corn was marked or set apart for the plaintiff at any time. *Held*, that under the circumstances the custom was irrelevant, and the evidence properly was excluded.

A milling company made a contract in writing for the sale to a customer of a certain quantity of meal, the contract providing that the customer might store any portion of the meal in the company's mill at his own risk for a certain period. The mill was burned before all the meal was called for by the customer, and the company refused further deliveries of the meal, contending that the title to the meal had passed to the customer before the fire. At the trial of an action

upon the contract by the customer against the company, evidence was offered by the company that the customer had taken out policies of insurance upon "grain" while stored in the company's mill, and that the company had stricken from its claims under its policies of insurance any claim for the loss of the grain sold to the customer. The evidence was excluded. *Held*, that the exclusion of the evidence as to insurance by the customer was proper, as the act of the customer in procuring insurance was not inconsistent with title to the meal being in the company; and that the exclusion of the evidence of the conduct of the company as to its insurance was proper, as such action was analogous to a declaration in its own interest after the rights of the parties had been fixed by the contract.

In an action against a milling company for damages due to its failure to perform a contract providing for the sale to the plaintiff of a certain quantity of meal at a certain price, it is proper for the judge to refuse to rule that in no event could the plaintiff recover more than the contract price.

CONTRACT, upon four promissory notes, made by John Shea and payable to the Chandler Grain and Milling Company. Writ dated December 14, 1908; also

CONTRACT by Shea against the Chandler Grain and Milling Company upon the agreement described in the opinion, for the sale to Shea of "damaged meal." Writ dated August 3, 1907.

In the Superior Court the cases were tried together before *Bell, J.* The facts are stated in the opinion. Upon answers of the jury to special questions submitted to them the judge ordered a verdict for the plaintiff in the first case in the sum of \$4,888.71, and for the plaintiff in the second case in the sum of \$5,929.69, and reported the cases for determination by this court.

J. P. Sweeney, for the Chandler Grain and Milling Company.

J. J. Sullivan, (*M. A. Sullivan* with him,) for Shea.

Rugg, C. J. The Chandler Grain and Milling Company, hereafter called the company, was engaged in the business of grinding, milling and handling grain at wholesale. Shea conducted chiefly a retail business in grain and meal. The company executed and delivered to Shea on June 7, 1907, a contract of the tenor following:

"We hereby confirm sale to you of five thousand (5000) bags Damaged Meal at 90c per bag f. o. b. teams or cars at our mill. It is understood that you are to have free storage for any portion of this meal for the remainder of this year; that it is at your risk as far as fire is concerned; that you are to give your notes in settlement for this Meal with interest, with the privilege of re-

newing them or any portion of them on which the meal they represent is unsold."

Contemporaneously notes of Shea were delivered to the company for the purchase price. Two hundred bags were delivered and paid for according to the contract, when the mill of the company was destroyed by fire. The company brings action against Shea on the notes and Shea against the company for damages in refusing to deliver to him the meal according to the contract.

There was no evidence tending to show that the company at the time of the sale had on hand the quantity of meal called for by the contract. The report states that no meal or corn was at any time marked or set apart for Shea. The contract does not point out any particular meal as the subject of the sale. It fixes merely quantity and quality. The title to meal would not pass to Shea until something was done to designate that which was covered by the contract. *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, and cases there cited. *Bristol Manuf. Co. v. Arkwright Mills*, ante, 172.

The company offered to show the existence of a trade custom to the effect that corn is spoken of as meal, and that when meal is sold it is sold in the grain with the understanding that it shall be ground and converted into meal shortly before delivery. It would be hard to say that a word of such definite meaning as "meal" when used in a written contract could be translated by oral evidence to signify corn. It is not necessary to determine whether under any circumstances such a custom would have been competent, for there were no conditions which rendered it admissible in the case at bar. There was no separation of corn to the satisfaction of the defendant's contract. There are no facts which point to an intent to pass present title to definite goods. Something had to be done to put the corn in condition to render it deliverable in conformity to the contract. When anything remains to be performed before an article which is the subject of a sale can be delivered, title does not pass until that thing is done. *Riddle v. Varnum*, 20 Pick. 280. *Wesoloski v. Wysoski*, 186 Mass. 495. *Automatic Time Table Advertising Co. v. Automatic Time Table Co.* 208 Mass. 252, 256.

Since no title had passed to any corn or meal beyond that de-

livered, it was of no consequence how much the company had on hand at the time of the fire.

The insurance policies held by Shea on "grain" while stored in the mill of the company were excluded rightly. Sometimes the existence of insurance may be some evidence of assertion of title by the insurer. Whether title was in Shea or not depended upon circumstances disconnected with insurance. The procurement of insurance by him was in no way inconsistent with title in the company under the facts disclosed.

The conduct of the company in striking from its claim for property covered by its insurance the balance of the meal sold to Shea was a declaration in its own interest made after the event, so far as these actions are concerned, and was excluded correctly.

There was no error in denying the company's sixteenth request for instructions to the effect that in no event could Shea recover more than the contract price. The general rule is that the measure of damages is the difference between the contract price and the market price at the time fixed for delivery. There was evidence which, taken at its face, tended to show that the market value was considerably in excess of the contract price. Its force and weight were for the jury.

So far as the requests for instruction were germane or have been argued, they are disposed of by what has been said.

Judgment on the verdict in each case.



MARGARET S. COATES, trustee, *vs.* EZRA LUNT & others.

Essex. November 7, 1912. — January 29, 1913.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Trust, Executor acting as trustee. Executor and Administrator. Probate Court. Equity Jurisdiction, To reform deed.

The fact that one, who was named and has been appointed executor of a will and to whom as a trustee property was given by the will, having given a bond as executor, fails to procure his formal appointment or to give a bond as such trustee, does not show conclusively that he has declined to act in that capacity;

and therefore a sale by him of trust property is not necessarily void solely for that reason.

By the residuary clause of a will two sisters were given certain real estate with other property in trust to pay the income thereof to themselves for life with remainders to their respective children and with a power, if by reason of misfortune either of them needed more than her share of the income, to sell the real estate. One of the sisters became needy and sold her interest in the real estate to her sister and signed an instrument which both sisters intended to be a formal conveyance in pursuance of such sale, but which was not so. The sister who sold her interest died, leaving children. The surviving sister paid to such children none of the income from any of the property which she held under the will as trustee. After her death a trustee under her will by a bill in equity sought to compel the children of the sister who had sold her interest to make formally the conveyance of the property which such sister ineffectually had attempted to convey. *Held*, that after the sale the purchasing sister held the interest of the first sister in the real estate absolutely and was not required to pay any income from that to the children of her sister; and that for any failure on her part to distribute properly the income of the remaining trust property, there was ample remedy in the Probate Court so that such failure furnished no equitable reason for depriving the plaintiff of the proper conveyance of the real estate.

BILL IN EQUITY, filed in the Superior Court on May 11, 1910, by the trustee under the will of Ellen M. Carter against the children of Sarah C. Lunt, alleging in substance that by the residuary clause of the will of Mary S. Greenleaf of Newburyport, who died on January 19, 1890, Ellen M. Carter and Sarah C. Lunt, sisters, were given, among other property, certain real estate numbered 32 on Market Street in Newburyport in trust to pay to themselves the income during their lives, with remainders over to their respective children and with a power, if by reason of misfortune either of them needed more than her share of the income, to sell and convey any or all of the real estate; that Sarah C. Lunt had become needy and that the sisters had decided to sell an interest in the property, and, to carry out that purpose, Sarah C. Lunt had sold her interest to Ellen M. Carter for a certain amount of money, but had not given her a proper deed; that Sarah C. Lunt had died on February 18, 1906, and that Ellen M. Carter had died on November 9, 1908. The prayer of the petition was that the defendants should be ordered to convey the interest in the real estate to the plaintiff by a proper deed.

By a decision reported in 210 Mass. 314, a decree sustaining a demurrer to the bill was reversed.

The case was heard by *Hall, J.*, upon an agreed statement of

facts giving the court power to draw inferences from the facts agreed upon and admitting the allegations of the bill excepting as to the following facts:

Neither Sarah C. Lunt nor Ellen M. Carter, the executrices of the will of Mary S. Greenleaf, ever had been appointed a trustee under that will by the Probate Court, nor had given bond as such trustee.

Ellen M. Carter did not pay any portion of the rents and profits of the estate devised and bequeathed by Mary S. Greenleaf to her and Sarah C. Lunt, to the children of the said Sarah C. Lunt, after the death of the said Sarah C. Lunt, and did not then "need more than half of said income for her comfortable support and maintenance" and did not believe that she needed more than half of the income after the death of the said Sarah C. Lunt.

Ellen M. Carter and Sarah C. Lunt were the only heirs at law of said Mary S. Greenleaf.

The defendants asked the presiding judge to rule in substance as follows:

1. If the plaintiff's testate, Ellen M. Carter, and Sarah C. Lunt did not give a bond to the judge of the probate court as trustees, they did not accept the trust and must be held to have declined the trust.

2. If Ellen M. Carter and Sarah C. Lunt declined the trust to which they were nominated in the will of Mary S. Greenleaf, the attempted conveyance alleged in the bill was void and the plaintiff is not entitled to any relief.

3. If Ellen M. Carter and Sarah C. Lunt did not give bond to the judge of probate as trustees under the will of Mary S. Greenleaf, they were not acting as trustees in holding and managing the real estate at 32 Market Square, and the plaintiff's bill must be dismissed.

4. Under the will of Mary S. Greenleaf, it was the duty of Ellen M. Carter, if she was a trustee, to pay over to the children of Sarah C. Lunt after the death of Sarah C. Lunt, one-half of the net income from the trust property then in the hands of Carter, if she did not need, and did not think she needed, more than one-half of the net income from the property.

5. If Ellen M. Carter was a trustee under the will of Mary S. Greenleaf and did not, after the death of Sarah C. Lunt, apply

one-half of the net income from the trust property then remaining to the use and enjoyment of the issue of said Sarah C. Lunt, who are defendants in this suit, the plaintiff, as trustee under the will of said Carter, is not entitled to any relief upon the pleadings and the agreed facts.

The presiding judge refused to rule as requested, made findings of facts which would entitle the plaintiff to a decree in her favor, and ordered a decree granting to the plaintiff the relief prayed for. The defendants alleged exceptions.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the defendants.

N. N. Jones, for the plaintiff.

SHELDON, J. The fundamental principles to be applied to this case have been settled. *Coates v. Lunt*, 210 Mass. 314. Only the specific questions raised by the defendants' exceptions are now before us.

1. The defendants' first and third requests for rulings rightly were refused. The failure of Mrs. Carter and Mrs. Lunt to procure their formal appointment as trustees by the judge of the Probate Court and to give to him bonds as such trustees did not conclusively show that they had declined to act in that capacity, or that they were not in fact acting as trustees in the matters set out in the bill, under the provisions of Pub. Sts. c. 141, § 18, then in force. *Jones v. Atchison, Topeka & Santa Fé Railroad*, 150 Mass. 304, 307. *Ricketson v. Merrill*, 148 Mass. 76, 82. *Howe v. Ray*, 110 Mass. 298. For any default upon their part in dealing with the trust estate, there would have been a remedy upon their bonds as executors. *Miller v. Congdon*, 14 Gray, 114, 115. *Prior v. Talbot*, 10 Cush. 1.

2. The second request was not applicable to the case. There was nothing further to show that they had "declined the trust to which they were nominated," and the statement in the exceptions that the judge who heard the case "made findings of facts which would entitle the plaintiff to a decree in her favor" sufficiently shows his finding that they had made no such declination. Such an inference by him was justifiable.

3. In equity the share in the real estate described in the bill, of which Mrs. Lunt originally had been entitled to receive the income, had before her death become vested in Mrs. Carter.

Mrs. Carter therefore held that share no longer as trustee, but in her own right, and the children of Mrs. Lunt had no interest therein or in the income thereof. In any event, and even if the children of Mrs. Lunt may have had some interest in other parts of the trust property, which we do not decide, no default or misconduct of Mrs. Carter as trustee could affect her right to the property which she individually had purchased, and which had been, though defectively and insufficiently, conveyed to her as an individual by an instrument which she had the right in equity to have reformed and rectified. That individual right of Mrs. Carter is now vested in the plaintiff, and the plaintiff can enforce it just as Mrs. Carter could have done. If Mrs. Carter was guilty of any default in her administration of the original trust, there was an ample remedy therefor. No equitable reason appears for depriving the plaintiff of the property by reason of any such misconduct by Mrs. Carter. It follows that the judge was right in refusing to give the defendants' fourth and fifth requests.

Exceptions overruled.

GRACE B. PROCTOR vs. MICHAEL MORAN.

Suffolk. November 11, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Lis Pendens. Summary Process for Possession of Land. Landlord and Tenant.

In a summary process under R. L. c. 181, for the possession of certain premises that had been occupied by the defendant under a lease from the plaintiff, which had been terminated for non-payment of rent by a notice in writing under R. L. c. 129, § 11, given by the plaintiff to the defendant one month before the date of the writ, it is no defense that an action is pending for the possession of the same premises brought by the plaintiff against the defendant under the same statute in a municipal court about seven months before the date of the writ in the present action in which the plaintiff obtained judgment and the defendant appealed to the Superior Court, filing a bond as required by R. L. c. 181, § 6.

SUMMARY PROCESS under R. L. c. 181, for the possession of certain premises, consisting of two large rooms on the first floor and the basement of No. 195 Hampden Street in Boston. Writ

in the Municipal Court of the Roxbury District of the City of Boston dated December 2, 1911.

The answer set up as a bar the pendency of the former action which is mentioned in the opinion, such former action having been brought under the same statute in the same municipal court on May 9, 1911, the plaintiff having obtained a judgment for possession and the defendant having appealed to the Superior Court and having given a bond under R. L. c. 181, § 6.

On appeal of the present case to the Superior Court it was tried before *Dana, J.* At the close of the evidence the defendant asked for sixteen rulings, which the judge refused to make on the ground that they were incorrect or immaterial. He found for the plaintiff for possession and costs. The defendant alleged exceptions to the refusal of the rulings requested and to the admission of certain evidence which is referred to in the opinion as not having harmed the defendant.

S. W. Wagner, for the defendant, submitted a brief.

H. R. Scott, for the plaintiff.

SHELDON, J. It was contended by the plaintiff and conceded by the defendant that the latter's only right to the premises was under the lease given to him by the plaintiff, which was in evidence; that he had paid no rent under this lease since a time before May 9, 1911, and that the plaintiff on November 2, 1911, had served upon him a notice to quit and deliver up the leased premises in fourteen days from that date. He paid no rent after that date. These facts entitled the plaintiff to recover unless some affirmative defense was shown. R. L. c. 129, § 11; c. 181, § 1.

The defendant has not disputed what has been said above, but contends that the pendency of the earlier action brought by the plaintiff against him to recover possession of the same premises and still pending in the Superior Court constitutes of itself a good defense to this action on the merits. But plainly that cannot be so. So far as appears the plaintiff had given the defendant no notice under R. L. c. 129, § 11, before bringing that action, and could not have recovered therein. And it is certain that the issue raised therein, whether she was entitled to possession of the leased premises on May 9, 1911, was different from the issue in this case, whether she was so entitled on December 2, 1911. Obviously the

first issue might call for a negative, and the second for an affirmative answer. *Thayer v. Carew*, 13 Allen, 82.

The bringing of the earlier action in no respect altered the defendant's position for the better, or gave him any new right to possession. Nor did his appeal and giving of a bond under R. L. c. 181, § 6, have any such effect.

It has not been argued that the bringing by the plaintiff of an action of contract against the defendant in March, 1911, to recover damages for his failure to put in a water closet as he had agreed to do, afforded any defense to this action, especially as no judgment had been entered in that case. It could have had no such effect.

No harm was done to the defendant by the admission of the testimony as to his failure to put in a water closet, or by the refusal to give the rulings for which he asked as to that. On the conceded facts, the plaintiff was entitled to judgment in any event.

We need not consider his requests for rulings in detail. All of them which were not wholly immaterial were rightly refused.

Exceptions overruled.

CITY OF BOSTON vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 11, 12, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Boston Transit Commission. East Boston Tunnel. Boston Elevated Railway Company. Statute, Construction. Words, "Entrances."

Under St. 1897, c. 500, § 17, authorizing the Boston Transit Commission to construct a tunnel to East Boston which when completed was to be leased to the Boston Elevated Railway Company, the elevators and their machinery reasonably necessary for transporting passengers between the surface of the ground and the station sixty feet underground beneath the corner of State Street and Atlantic Avenue are entrances to the tunnel to be furnished and paid for by the Boston Transit Commission and are not equipment of the railway required to be installed by the Boston Elevated Railway Company.

CONTRACT by the city of Boston against the Boston Elevated Railway Company to recover \$44,450 expended by the plaintiff

through the Boston Transit Commission for the construction of elevators and machinery to be used and operated in the elevator shafts or wells built by that commission at the station under State Street at its intersection with Atlantic Avenue in connection with the tunnel to East Boston constructed under authority of St. 1897, c. 500, § 17. Writ dated October 9, 1907.

In the Superior Court the case was heard by *Fessenden, J.*, without a jury. The judge took a view of the premises. The material facts are stated in the opinion.

At the close of the evidence the defendant asked the judge to make, among others, the following rulings:

"4. The question stated in request 1 [as to the obligation of the defendant to repay to the plaintiff the cost of installing the elevators and machinery] is a question to be determined by the court, as such, not by the presiding justice in his capacity as a tribunal to find facts.

"5. The question stated in request 2 [whether the defendant or the Boston Transit Commission was bound to provide the elevators and machinery] is a question of law.

"6. The question stated in request 2 is a question to be determined by the court, as such, not by the presiding justice in his capacity as a tribunal to find facts.

"7. The defendant was under no obligation to furnish or install the elevators or machinery in question.

"8. It was the duty of the Boston Transit Commission to provide the elevators and machinery in question.

"9. According to the true construction of St. 1897, c. 500, if the elevators in question were reasonably necessary for the accommodation of the public in the use of the station as built, it was the duty of the Boston Transit Commission to provide them.

"11. According to the true construction of St. 1897, c. 500, the elevators are a part of the tunnel, its approaches, entrances and stations, constructed as these were.

"12. According to the true construction of St. 1897, c. 500, these elevators are a part of the station.

"13. These elevators constitute a part of the tunnel and the 'stations and connections therefor' within the meaning of St. 1897, c. 500, § 17.

"14. There is no evidence to warrant a finding for the plaintiff.

"15. Upon all the evidence the plaintiff cannot recover.

"16. If the elevators referred to in the agreement annexed to the declaration were so essential to the convenient use by passengers of the station as built that some party was bound to furnish them, then, according to the true interpretation of St. 1897, c. 500, it was the duty of the Boston Transit Commission to provide them."

The judge refused to make any of these rulings. He made other rulings to the effect, that the question whether the defendant was under an obligation to repay to the plaintiff the cost of installing the elevators and machinery was a question of interpretation of St. 1897, c. 500, and that this was a question of law; that the question whether the defendant or the Boston Transit Commission was bound to provide the elevators and machinery was a question of the interpretation, or construction, of St. 1897, c. 500, combined with the view and agreed facts; and that the agreement upon which the plaintiff sued expressly assumed that the elevators were so essential to the convenient use by passengers of the station that some party was bound to furnish them.

The judge made the following findings of fact:

"1. These elevators were reasonably necessary for the accommodation of the public in the use of the station as built.

"2. The elevators and machinery when operated were, under all the circumstances, reasonably necessary to enable the travelling public using the station to reach the surface of the ground from the platform or *vice versa*, or the elevated station in Atlantic Avenue or *vice versa*.

"3. That the bill sued on is for the elevators and the machinery to run them.

"4. That unless the machinery is actually in operation raising and lowering the elevators they would be of no use.

"5. That on my view I found that the elevators were used almost entirely as a means of communication between the tunnel station and the elevated railway station and very little by passengers going to the station from the street or from the station to the street, but the use of the stairway by either class of passengers was extremely rare.

"6. That the elevators and machinery were not tunnel, station

or approaches but equipment, — a means of conveying passengers from the station to the street and the elevated railway station, and from the elevated railway station and street to the station platform.”

The judge found for the plaintiff in the sum of \$51,612.52; and the defendant alleged exceptions.

T. Hunt, for the defendant.

J. P. Lyons, for the plaintiff.

SHELDON, J. The Boston Transit Commission, in accordance with the requirement of St. 1897, c. 500, § 17, constructed a tunnel running from Boston proper to East Boston. That section, so far as now material, reads as follows: “The Boston Transit Commission shall construct a tunnel or tunnels, of sufficient size for two railway tracks, with approaches, entrances, sidings, stations and connections therefor, and for the running of railway cars therein, from a point on or near Hanover Street in the city of Boston, or such other point or points as said board may deem proper for a suitable connection with the subway or subways provided for” in another statute, “to a point at or near Maverick Square in that part of Boston called East Boston, where a suitable connection with surface tracks may be made. Said tunnel or tunnels shall be constructed in a thorough and substantial manner, with special reference to strength, durability and safety for railway travel, and shall be water tight, or in case of leakage the water shall be taken care of by said city.” The section then enacts that the tunnel when completed shall be leased to the defendant. Section 18 of the same statute provided for the issue of bonds by the city of Boston, the proceeds of which should be applied to pay “the cost and expenses of constructing” certain other subways “and of the tunnel or tunnels . . . provided for in the preceding section, and the stations, inclines and steps in connection therewith.” In the tunnel the Transit Commission constructed a station near the corner of Atlantic Avenue and State Street, and at each end of the station put in a stairway running to the surface of the street. The Commission constructed also at this station elevator shafts or wells, adapted and intended for four large elevators running from the floor of the tunnel not only to the surface of the street, but also to a landing fourteen feet above that surface and connected with a station on the defendant’s elevated railway. The commission

built and paid for this station both above and below ground, the elevator wells or shafts, and the stairways which have been mentioned. There was no dispute that it was for the defendant to lay the railway tracks in the tunnel, to install the electrical apparatus necessary for the running of its cars, and generally to provide the equipment for the operation of its railway therein. The commission and the defendant under these circumstances could not agree which party was to provide and install the elevators themselves; and desiring to avoid delay, and assuming that elevators were so essential to the convenient use by passengers of the station that some party was bound to furnish them, they agreed that this should be done by the commission, and that the cost thereof should be repaid by the defendant if it should be found to be liable therefor. This was accordingly done by the commission, at an expense of more than \$40,000 and the present action is brought to recover that amount from the defendant. The precise question presented is whether, taking the tunnel and station together, as they actually have been built, these elevators are, within the meaning of the statute which has been quoted, properly a part of the tunnel or of the approaches, entrances, stations and connections therefor which the act requires the commission to provide at the expense of the plaintiff, or whether they are merely equipment of the railway or appurtenances thereof which the defendant must install at its own expense.

A preliminary question is whether, after it has been determined what is the character of the instrumentalities in question, and whether or not the means of access to the tunnel and the station which they afford are reasonably necessary for that purpose, the point is to be determined as an issue of law or of fact. That question in our opinion is settled in principle by the decision in *Selectmen of Natick v. Boston & Albany Railroad*, 210 Mass. 229, 232. As in that case, the question here is as to the meaning of the words used in the statute; and that is a question of law. And in *Browne v. Turner*, 174 Mass. 150, 161, the court determined the meaning of the word "connection" in this very statute as a question of law. So in this case, it being settled just what these particular structures or articles of mechanism are, just what purpose they are intended and fitted to serve, and whether or not that use is both designed and adapted and reasonably necessary for the pur-

poses prescribed by the statute, it becomes a pure question of law whether that structure or that piece of mechanism is or is not a part of the tunnel, its approaches or entrances.

The character of this elevator plant, including the cars and the machinery by which they are operated, is not in dispute. That the whole plant is reasonably necessary for the accommodation of the public, to afford access to and departure from the tunnel, was found as a fact. That this finding was fully warranted has not been denied, and indeed is hardly open to dispute. It seems to have been assumed by both parties. It is manifest enough that the stairways at the east and west ends of the station, with their restricted width, their great length, and the small number of their breaks or platforms, do not furnish a convenient means of access to the station, and often might be wholly insufficient for that purpose. It may be doubted whether any stairways could be regarded as adequate approaches or entrances to a tunnel sixty feet underground. But this question need not be discussed; it is concluded by the finding that has been made.

It is, as it must be, undisputed that the stairways are "approaches" or "entrances" within the meaning of those words as used in the statute. It is plain too that when it was seen that the two stairways provided did not furnish sufficient means of entrance, the duty of the Transit Commission was not fulfilled, but it was incumbent upon them to provide further entrances or approaches. If instead of constructing elevator shafts they had chosen to put in moving sidewalks or escalators, these certainly would have been included within the words of the statute. But such moving sidewalks would not have served their purpose, would not have been capable of use in the manner intended and with the convenience to the travelling public which was aimed at, unless with them and as a part of their construction was furnished also the mechanism by which they could be operated. An elevator shaft without a car to run therein and machinery by which to operate it is wholly useless; it is no entrance at all; it becomes an entrance only when suitably fitted up and supplied with the means by which alone it can be made to serve as an entrance. It is only the completed plant that can be used as an entrance; the completed plant therefore must be included in that word.

The object of the whole body of legislation of which the statute

before us is a part was, as was said in *Browne v. Turner*, 174 Mass. 150, 162, "to secure rapid transit in Boston and vicinity, and to reduce the congestion in the streets by means of a system of subways and tunnels;" or in other words, as stated in *Mahoney v. Boston*, 171 Mass. 427, 429, "to promote the convenience of the inhabitants of Boston, and of the public generally, by furnishing increased accommodations for public travel." This object could not be wholly accomplished in the case of a station like this situated sixty feet underground, with no room available for access by easy slopes, without the use of elevators. The elevator shafts by themselves cannot supply this want; they are incapable of use without cars and machinery. It seems manifest to us that it is the completed elevators that constitute the entrance, the elevators supplied with cars and machinery, capable of affording entrance to the tunnel and serving as an approach thereto.

We do not consider the fact that these elevators reach a point somewhat above the surface of the street, so as to furnish a connection with the defendant's elevated railway station, to be material, as the case has been presented to us. The system now appears to be one integral whole, not divided or attempted to be divided into separate parts with a plane of division at the surface of the street. How this may appear at another trial of the case, we do not know. The shafts or wells were, as they should have been, built by the Commission as a part of the tunnel. The elevators fitted for use are a necessary part of the entrance or means of access thereto. Perhaps the commission might have limited the height of their construction to the surface of the street; but so far as appears they did not choose to do so, and they may have acted wisely in affording ready means of communication and direct entrances and approaches between the tunnel and the elevated railway system. While all this construction was of course for the benefit of the public, it must be remembered that this benefit was to be obtained and the congestion of the streets was to be avoided by providing accommodations for those who were, or had been, or were about to become passengers upon the cars of the street railways. The finding of the judge at the trial, "that the elevators were used almost entirely as a means of communication between the tunnel station and the elevated railway station, and very little by passengers going to the station from the street

or from the station to the street," indicates that the object of the legislation was attained by keeping in this way a greater or smaller number of passengers from the street and avoiding at least one probable source of congestion therein.

It follows from what we have said that the judge at the trial, upon his preliminary findings of fact, should have ruled, as requested by the defendant, that the duty of furnishing and installing the elevators as an entrance to the tunnel and the station therein rested upon the Transit Commission and not upon the defendant, and so that this action could not be maintained upon the evidence put in, and that his sixth finding, at least so far as it applied to the whole of the perpendicular elevator plant or system, was erroneous as matter of law.

Exceptions sustained.

JOSEPH B. PHIPPS vs. HENRY C. LITTLE & another.

Suffolk. November 12, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Partnership. Name. Evidence. Estoppel.

Where two persons were engaged in the manufacture of an article of merchandise and shared the profits of the business, they can be found to have been members of a trading partnership, although one of them furnished all the capital.

A member of a trading partnership has implied authority to borrow money for partnership purposes and to make and deliver a promissory note therefor in the firm name.

In an action against the members of a partnership on a promissory note, if the note sued upon bears a signature which is not strictly accurate as the firm name but which has been used by the defendants in the partnership business and by which the partnership is known commercially as well as by its true name, the difference between the correct name of the firm and the signature on the note is immaterial.

In an action of contract against two defendants as copartners, where one defendant is defaulted and the trial proceeds against the other, who contends that the defaulted defendant was not his partner but was employed by him under a contract by which the defaulted defendant was to receive a percentage of the profits of the business as compensation for his services, evidence offered by the defendant against whom the case is being tried, to show that he made a contract with another person by which such other person was to receive

a percentage of profits in addition to his weekly compensation, properly is excluded as immaterial, it having no tendency to show that the contract between the two defendants was not one of partnership.

In an action on a promissory note against two defendants as copartners, where one of the defendants, who signed the note in the partnership name, is defaulted, and the other defendant contends that the defaulted defendant when he signed the note was not his partner, and where there is evidence that the two defendants were members of a trading partnership, it is right for the judge to exclude evidence offered by the defendant against whom the case is being tried to show, that before the note sued upon was negotiated he directed the defaulted defendant to borrow no more money from the plaintiff, unless he also offers to show that the plaintiff had notice of such limitation of authority or from the circumstances ought to have known of it.

One who knowingly allows himself to be held out as a member of a trading partnership is liable for an indebtedness of the apparent partnership to one who honestly has been misled by such holding out into giving credit to such apparent partnership.

CONTRACT, upon eight promissory notes, each declared upon in a separate count, all signed "Little Eastman Co.," which was alleged to be the firm name in which the defendant Little and the defendant Eastman did business as copartners. Writ dated July 2, 1909.

In the Superior Court the case was tried before *Dana, J.* The defendant Eastman was defaulted, and the trial proceeded against the defendant Little. The evidence is described sufficiently in the opinion. At the close of the evidence, the defendant Little asked the judge to make twenty-three rulings, of which the first two were as follows:

"1. On all the evidence the plaintiff cannot recover.

"2. On all the evidence the defendant Little never held out the defendant Eastman to the plaintiff as a partner."

The judge refused to make these rulings and also refused to make the other rulings requested by the defendant except so far as they were embodied in his charge. The jury returned a verdict for the plaintiff against the defendant Little on each of the eight counts; and the defendant Little alleged exceptions, raising the questions which are stated in the opinion.

S. R. Wrightington, for the defendant Little.

U. D. Garfield, for the plaintiff.

BRALEY, J. If the relation between the defendants was that the defendant Eastman, who was defaulted at the trial, should receive a percentage of the profits as compensation for his services, then,

as the judge told the jury, he was an employee of the defendant Little, and not a partner. The evidence, however, was plenary that under the name of Little and Eastman Company the defendants engaged in the manufacture of banjo clocks, and, although Little furnished the capital, the profits were to be divided between them in certain proportions. The jury, if convinced that this was the understanding and agreement, were warranted in finding a trading partnership. *McMurtrie v. Guiler*, 183 Mass. 451, 453. *Esterbrook v. Woods*, 192 Mass. 499, 502. And Eastman as a member had implied authority to borrow money in the name of the firm, and to make and deliver the promissory notes in suit, if the proceeds were needed for partnership purposes. But he would have no right, as the jury were fully instructed, to borrow for his personal use on the firm's credit, and, if the money was lent with knowledge of his purpose, the plaintiff could not recover. *Feigenspan v. McDonnell*, 201 Mass. 341, 346.

Nor is the technical variance between the name of the firm and the signature on the notes of "Little Eastman Co." material. The notes eight in number given on different dates bore the same signature, in which name the testimony showed the firm's business had been carried on and checks for merchandise sold were made payable. It is a question of identity where a trade name which differs from the actual name either of a person, firm or corporation is used in business, and the jury from these transactions properly could find that the partnership was known commercially as well by one name as the other. *Young v. Jewell*, 201 Mass. 385, 386, and cases cited. *William Gilligan Co. v. Casey*, 205 Mass. 26, 31. R. L. c. 73, § 35. *Tilford v. Ramsey*, 37 Mo. 563, 567. *Williamson v. Johnson*, 1 B. & C. 146. *Norton v. Seymour*, 3 C. B. 792. *Stephens v. Reynolds*, 5 H. & N. 513, 517.

The evidence offered by the defendant Little of the contract made by him with one Menns, by which Menns was to receive a percentage of profits in addition to his weekly compensation, was rightly excluded. It had no tendency to disprove the contract of partnership between the defendants. *Kimball v. Longstreet*, 174 Mass. 487.

The ruling excluding the further offer to show, that the defendant Little directed Eastman before the notes in question were negotiated not to borrow more money from the plaintiff was

right. If he wished to protect himself from liability in the future the defendant should have given notice to the plaintiff of his dissent, but, having remained silent, the plaintiff's title has not been impeached. *Boardman v. Gore*, 15 Mass. 330. *Smith v. Collins*, 115 Mass. 388. *Stimson v. Whitney*, 130 Mass. 591, 594, 595. *Feigenspan v. McDonnell*, 201 Mass. 341. The defendant, however, had the benefit of instructions that the jury must consider the questions whether on all the evidence the authority of Eastman to borrow had been restricted and whether the plaintiff knew or from the circumstances ought to have known of the restriction.

But, even if the jury accepted the defendant's theory that as between themselves Eastman was merely an employee, there was evidence from which they could find, as the judge correctly said, that the defendant had permitted himself to be held out as a partner. The principle of estoppel is applicable. By the defendant's direction the name of "Little & Eastman Co." had been placed on the front door of the company's manufactory, and printed on the stationery used in the business, and the plaintiff testified that upon the defendant's invitation he visited the manufactory and saw signs displayed with the firm name. It does not appear, that the defendant ever directed the discontinuance of the signs or the use of his name as a part of the style of the firm in the transaction of business, or informed the plaintiff that he was not a partner. The defendant having knowingly permitted himself to be held out as a member of the firm, the plaintiff, if honestly misled by the representations into giving credit to the apparent partnership, can hold him responsible for the indebtedness as if he had been a partner in fact. *Fitch v. Harrington*, 13 Gray, 468. *Pratt v. Langdon*, 12 Allen, 544; S. C. 97 Mass. 97. *Getchell v. Foster*, 106 Mass. 42, 47. *Rice v. Barrett*, 116 Mass. 312. *Locke v. Lewis*, 124 Mass. 1, 18. *Thompson v. First National Bank of Toledo*, 111 U. S. 529. It was for the jury to pass upon all of these disputed questions of evidence, and the defendant's first and second requests could not have been given, while the remaining requests in so far as they were appropriate are embodied in the charge, which was full and accurate.

Exceptions overruled.

TERESA M. WALDEN vs. OSCAR L. WALDEN.

Norfolk. November 13, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Husband and Wife. Descent and Distribution. Widow.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905. c. 256, the widow of a man who died intestate without issue takes a one half interest in real estate in which her husband at the time of his death had a vested remainder subject to a life estate that terminated after his death.

PETITION, filed in the Probate Court for the County of Norfolk on April 21, 1910, by the widow of Ernest L. Walden, who died intestate and without issue on March 6, 1909, praying for the partition of certain real estate in Plainville, which had belonged to James H. Walden, who died on April 20, 1885.

In the Probate Court *Flint, J.*, made a decree that, it appearing that the title to the real estate in question was in dispute, the case was removed to the Superior Court.

In the Superior Court the case was submitted upon an agreed statement of facts to *Lawton, J.*, who made an interlocutory order that partition should be made, but, being of opinion that such order ought to be determined by this court before further proceedings were had in the Superior Court, reported the case for such determination. The material facts are stated in the opinion.

O. A. Marden, for the petitioner.

E. J. Whitaker, for the respondent.

SHELDON, J. Under the will of James H. Walden, who died in 1885, his son, Oscar or Lucius, the respondent, took the half part of one parcel of the testator's real estate, and the testator's widow took and enjoyed under the will a life interest in all the residue of his real estate. As to the remainder in this residue, James H. Walden died intestate. Under the statute then in force, (Pub. Sts. c. 124,) that remainder vested, subject to the life estate of his widow, in his two sons, the respondent and Ernest L. Walden, as tenants in common, and each one of them then took a vested and alienable interest in his undivided share. See the cases collected

by Lathrop, J., in *Baker v. Baker*, 167 Mass. 575, 576. Ernest L. Walden died on March 6, 1909, intestate and without issue, while his mother was yet living, leaving the petitioner as his widow and his mother and the respondent as his only next of kin. His mother, the holder of the life estate, has since died, leaving the respondent as her only next of kin.

The petitioner, as the widow of Ernest L., claims to be entitled to one half part of his interest in the lands in which he had inherited an undivided share from his father. The respondent contends that she did not take any portion of these lands or any interest therein because her husband held in his lifetime only an estate in remainder and never had any actual seisin or possession thereof. He relies upon the decisions in *Watson v. Watson*, 150 Mass. 84; *Baker v. Baker*, 167 Mass. 575; and *Hill v. Pike*, 174 Mass. 582. But these cases were all decided under Pub. Sts. c. 124, § 3; Ernest L. Walden died in 1909; and the rights of his widow are determined by the statute then in force, R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256. That statute, so far as directly material, reads as follows: "If the deceased leaves no issue, the surviving husband or widow shall take five thousand dollars and one half of the remaining personal property and one half of the remaining real property." This is an increase of the rights of the surviving spouse. Each is made, in case of the intestacy of the other, a statutory heir in all the real property of the other. The difference in the present statute from the effect which had been given to the earlier act has been pointed out by this court. *Holmes v. Holmes*, 194 Mass. 552, 558 *et seq.* *Peabody v. Cook*, 201 Mass. 218, 220. *Nesbit v. Cande*, 206 Mass. 437, 439.

It follows that the petitioner holds the interests which she has averred in and to the different parcels of land described in her petition, and the interlocutory judgment for partition must be affirmed.

So ordered.

FRANK W. HAMILTON vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. November 13, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Conduct of trial: requests, rulings and instructions, judge's charge;
Exceptions. *Negligence*, Street railway.

At the trial of an action against a street railway company to recover for personal injuries caused by the plaintiff being thrown down as he was attempting to board a car of the defendant, there was evidence introduced by the defendant tending to show that the plaintiff attempted to board the car while it was moving, and the defendant asked for a ruling that, "if the plaintiff attempted to board a moving car, he cannot recover." The judge assumed that the ruling asked for was intended to call his attention only to the question of the plaintiff's due care. *Held*, that the judge was justified in making such an assumption, and that, if the defendant wished to have the ruling made with reference to the question of the defendant's negligence, he should have so requested in unmistakable language.

To attempt to board an electric street car while it is in motion is not negligence as a matter of law.

Where, at the trial of an action against a street railway company for personal injuries, the defendant's counsel asked for a ruling which, so far as appeared from its wording, he might have intended to have applied either to the question of the due care of the plaintiff or to the question of the negligence of the defendant, and he did not make clear to which branch of the case he wished to have it applied, an exception by the defendant to a failure of the judge to give the ruling with regard to the question of the defendant's negligence cannot be sustained.

If an electric street car is stopped to receive passengers, it is the duty of the conductor, before giving a signal to start the car, to ascertain, if he can do so by the exercise of due care, caution and diligence, that all who desire to board the car have had an opportunity to do so and that no person is attempting to get on the car under such circumstances as would make it dangerous to signal for the starting of the car.

Unless substantive error or injustice plainly appears, a general exception to specific portions of the charge of a judge to a jury will not be sustained, if no specific requests were made by the excepting party, pointing out his objections.

BRALEY, J. This is an action of tort for personal injuries suffered by the plaintiff while attempting to board a car of the defendant. At the trial in the Superior Court* he recovered a verdict, and the case is here on the defendant's exceptions.

* Before *Hitchcock*, J.

The evidence as to the plaintiff's position at the time of the accident is irreconcilable. If the jury believed the statements of the plaintiff which were corroborated by his companion and witness Freeman, the car stopped at the regular stopping place after they had signalled the motorman, when, as the plaintiff following Freeman reached the rear part of the running board, the conductor, who stood "right over him," gave two bells, the car started and threw him to the ground. The defendant's evidence, however, tended to show that the plaintiff, running from behind, attempted to board the car at the rear while it was in motion and before it reached the stopping place. It is manifest as the case stood when the evidence closed, that the usual questions of the plaintiff's due care, and of the negligence of the defendant's servants were for the jury under appropriate instructions.

The only request presented by the defendant asked for a ruling, that "if the plaintiff attempted to board a moving car, he cannot recover." The defendant concedes, that where a person, desiring to become a passenger, attempts to get on a moving car, it cannot be said as matter of law that he failed to use ordinary prudence. But it contends, that under the circumstances to which full reference has been made, the judge should not have denied the request. The presiding judge was required to rule and instruct upon the whole evidence and not upon part of it, and even on the defendant's theory the jury could find, that the plaintiff exercised ordinary care. *Neff v. Wellesley*, 148 Mass. 487.

The real ground of defense upon the defendant's evidence, however, was, that even if the plaintiff could be found not to have been at fault, there was no proof of its negligence. In the ordinary acceptance of words, the judge assumed and was justified in assuming that the defendant intended to call to his attention only the question of the plaintiff's due care. This is very plainly shown by the following instructions: "The rule of law so far as the plaintiff's position is concerned, is this: . . . If the car is not stopped to receive passengers and he undertakes to get on the car, then the question of fact is presented whether in attempting to do so he acts as a reasonably prudent person would act. I cannot say to you as a matter of law that it is carelessness on his part to attempt to get on a moving car, because I do not understand that that is the law. . . . You are to say in the first place whether

he did attempt to get on a moving car or not. If he did, whether his action in so doing was that of a reasonably prudent and careful person."

It was the duty of counsel if he wished an instruction such as he now contends for to have said so in unmistakable terms, and the failure at the trial to make his position clear cannot be supplied by a possible double meaning of the request.

The defendant also excepted to the instructions quoted, but they were correct as matter of law.

The following instructions, that "in regard to the second proposition, the question is presented as a question of fact, was there any negligence on the part of the defendant company? And by that is meant in this case, was there any negligence on the part of the conductor in starting the car? The rule of law is substantially this, briefly stated, that if a car is stopped to receive passengers, it is the duty of a conductor, before giving the signal to start the car, to ascertain, if he can by the exercise of due care, caution and diligence on his part, that all who desire to board the car at that time have had an opportunity to do so, and that no person was attempting to get upon the car under such circumstances as would make it dangerous for him to give a signal to start the car. That does not necessarily mean that the conductor under all circumstances is bound to look around and see, but it does mean that he must exercise that care which I have indicated by the terms 'due care, caution and diligence,' " were also applicable to the evidence, and afford no ground of complaint.

The entire charge, although given in so far as material, does not appear in the record, and the remaining exceptions were taken to portions of the instructions during a colloquy between the judge and the defendant's counsel. The running commentary is as follows: "I thought there were parts of your charge that are consistent with the proposition that if the conductor had a car standing still and saw somebody running towards it and started it before the man got to it, that he might recover." The judge then said, "No, I did not say that." The counsel for the defendant then said, "I understood from your charge that if a conductor saw somebody running towards a car, it would be evidence of negligence on the part of the defendant to start the car when the conductor saw a man coming towards it." The judge however

had instructed the jury as follows: "If a conductor acting in that way sees no one who is desirous of taking the car, he is then at liberty to give a signal to go ahead. He is not bound to anticipate that anyone is going to come running around the car to take it, or run after the car unless he sees them do so. If he does not there would be no negligence on the part of the company in doing so." To this part also of the charge the attention of the judge was directed, and counsel for the defendant made the following incomplete statement, but not within hearing of the jury: "It seems to me that your view that a conductor may be negligent who gives a bell to start the car while somebody is running towards it" — when the judge again said, but not within the hearing of the jury, "I think it would be evidence of negligence." The exceptions state, "To the part of the charge above set forth the defendant duly excepted," and "The attention of the judge was again directed to the defendant's request," and the defendant excepts "to the charge as being inconsistent with such request." It is to be observed, that although in reply to counsel the judge said that in his opinion "it would be evidence of negligence" on the part of the conductor to start a car while somebody is running toward it, yet this was not said to the jury or in their hearing, and the instructions as set forth are not open either directly or by implication to this interpretation, and the defendant excepted to the instructions actually given, not to the views of the judge expressed in the presence of the jury but not within their hearing. It may be that in the opinion of counsel the instructions were not sufficiently full, and should have been elaborated as to what the jury should find if they accepted the defendant's theory of the accident, but he did not ask for more specific instructions on this point. A general exception to specific portions of the charge where no specific requests are asked for will not be sustained unless substantive error or injustice plainly appears. *Commonwealth v. Meserve*, 154 Mass. 64.

We are of opinion that when read together the instructions as reported were adapted to the evidence, and the jury must have understood, that, if the plaintiff attempted to board the car in the manner urged by the defendant, no negligence on the part of the company had been shown. *Adams v. Nantucket*, 11 Allen, 203, 205. *Wilson v. Terry*, 11 Allen, 206. If as appears from the

verdict they believed the plaintiff's version, this is not an error of law.

Exceptions overruled.

H. D. McLellan, for the defendant.

J. J. Irwin, for the plaintiff.



IDA B. JAMES *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 14, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Conduct of trial: setting aside verdict, ordering verdict; Exceptions, Report. *Superior Court. Rules of Court. Negligence*, Street railway.

A judge of the Superior Court has no power, after a verdict has been returned and recorded, to grant a motion of one party, without notice to the adverse party and in his absence, that the verdict be set aside and the case be reported to this court for determination.

So much of Rule 45 of the Superior Court as provides that, "When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following," has no application to the action of a judge in setting aside a verdict for a plaintiff after it has been returned and recorded and ordering the jury to return a verdict for the defendant.

After a verdict has been returned and ordered recorded, the deliberations of the jury are ended and no further instructions as to the questions raised at the trial properly can be given to them.

Where, after a verdict for a plaintiff has been returned and ordered recorded, the defendant moves that the verdict be set aside and that the case be reported to this court, and the presiding judge, without notice to the plaintiff and without the plaintiff being given an opportunity to be heard, sets the verdict aside, orders a verdict for the defendant and reports the case to this court, filing a memorandum stating that he agreed to report the case to this court and that, if his ordering of a verdict for the defendant was right, judgment is to be entered upon such verdict and "otherwise, judgment" is "to be entered for the plaintiff in the sum fixed by the jury," the rights of the plaintiff with regard to the propriety of the action of the judge are fully saved.

At the trial of an action by a woman against a street railway company for personal injuries, there was evidence tending to show that the plaintiff, while she was the only person other than the motorman and the conductor upon a car of the defendant, informed the conductor that she wished and intended to alight at a certain regular stopping-place, that the car stopped at that place, and that,

while the conductor stood upon the front platform of the car, the plaintiff passed to the rear platform through the rear door, shut the door, and lifted one foot, when she heard two bells and the car started suddenly forward, and that she then "knew no more." There also was evidence that the plaintiff afterwards was found lying injured beside the street railway track. The foregoing evidence was contradicted. There was a verdict for the plaintiff. *Held*, that the verdict was warranted.

TORT for personal injuries alleged to have been received by the plaintiff by reason of a car of the defendant being started as she was in the act of alighting therefrom at the corner of Centre Street and Walden Street in that part of Boston called Jamaica Plain. Writ dated January 8, 1909.

In the Superior Court the case was tried before *Dubuque, J.* Besides the testimony of the plaintiff stated in the opinion, she testified that, at the time when she was injured, she was the only person on the car excepting the motorman and the conductor, that, after she reached the rear platform and raised one foot, she heard two bells "and knew nothing more," excepting that she felt the starting of the car and a jerk of the car, and that, when she heard the two bells, she was attempting to get off from the right hand side of the rear platform of the car. There also was evidence that the plaintiff afterwards was found lying unconscious beside the street railway track. There was a verdict for the plaintiff in the sum of \$1,000, which, under the circumstances stated in the opinion, the judge set aside. He ordered a verdict for the defendant, and reported the case to this court for determination. The memorandum filed by the judge and referred to in the opinion was as follows:

"A jury returned a verdict for the plaintiff and the Court, upon the defendant's motion, set aside such verdict and ordered a verdict to be returned for the defendant, upon the ground that there was not sufficient evidence to warrant a verdict for the plaintiff.

"The Court agrees to report the case to the Supreme Judicial Court for the Commonwealth: if the ruling of the Court, in ordering a verdict for the defendant, was right, then judgment to be entered upon the verdict so ordered, for the defendant; otherwise, judgment is to be entered for the plaintiff in the sum fixed by the jury."

E. W. Philbrick, for the plaintiff.

F. Ranney, (*T. Allen, Jr.* with him,) for the defendant.

BRALEY, J. By the terms of the report "it is agreed by the parties that if the plaintiff's exceptions were properly alleged, saved and filed, and should be sustained, or if, for any reason, the plaintiff is entitled to a new trial, then judgment is to be entered for" her "in the sum fixed by the jury." The procedure at the trial was fluctuating and unusual. At the close of the plaintiff's evidence the defendant requested a ruling that she was not entitled to recover. The judge upon hearing counsel announced that the request would be granted, and after saving exceptions counsel for the plaintiff left the court room. The defendant's counsel, however, almost immediately asked to have the case submitted to the jury, and thereupon plaintiff's counsel returned, and the taking of evidence was resumed. The defendant when the testimony was in excepted to the submission of the case to the jury, "on the ground of insufficiency of the evidence." Apparently this ruling was refused, and the jury returned a verdict for the plaintiff. It may be inferred that this result was unanticipated, for on the return of the verdict a motion to set it aside upon the ground, that there was not sufficient evidence to warrant it, and that the case be reported to this court, was promptly filed by the defendant. The judge, without notice to the plaintiff's counsel, and in his absence, at once set the verdict aside and directed a verdict for the defendant, which was returned. If seasonably excepted to the order would have been vacated, as the proceedings were not only irregular, but a nullity. R. L. c. 173, § 112. *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 229. *Shanahan v. Boston & Northern Street Railway*, 193 Mass. 412. The defendant urges that under Rule 45 of the Superior Court, that, "When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following;" the plaintiff's exceptions, which appear to be in proper form to raise the question, were filed too late. *McCoy v. Jordan*, 184 Mass. 575, 582. *Goodrum v. Grimes*, 185 Mass. 80. The position is well taken if the rule is applicable, as the exceptions were not filed until eleven days after counsel for the plaintiff had been notified of the order. If upon reading the verdict after it had been handed to him by the clerk and before ordering it affirmed and recorded, the judge had directed

a verdict for the defendant his instructions would have been within the rule. *McManus v. Thing*, 208 Mass. 55, 59. But when the verdict had been returned and ordered recorded, the deliberations of the jury were ended and no further instructions as to the questions raised at the trial properly could be given. *Brown v. Dean*, 123 Mass. 254, 266, 267. It moreover should be noted that, the order or memorandum granting the motion and directing the verdict having provided that the case should be reported as requested in the motion, the plaintiff's rights, as the judge intended, are fully saved by the report, with the acquiescence of the defendant.

We accordingly pass to the merits. Very plainly a verdict for the defendant could not have been ordered. The jury would have been warranted in finding that the plaintiff, upon becoming a passenger, informed the conductor that she wished and intended to alight at Walden Street, a regular stopping place. The car having stopped at the street, the conductor was required to use reasonable care to ascertain if she had alighted before it was again started. But the plaintiff testified, that the conductor stood on the front platform, as she moved to the rear door, passed to the platform, shut the door, and lifted her foot when she heard two bells, and the car suddenly moved forward, causing the accident. Although there was contradictory evidence, the credibility of the witnesses and the weight of their testimony was for the jury. It is sufficient, that they were at liberty to believe her statements, and, as the verdict shows, the negligence of the defendant and her own due care, had been proved to their satisfaction. *Vine v. Berkshire Street Railway*, 212 Mass. 580, and cases cited.

The plaintiff accordingly is to have judgment as stipulated.

So ordered.

MARTIN PELATOWSKI & another vs. KELSEY B. BLACK.

Suffolk. November 14, 1912. — January 29, 1913.

Present: RUGG, C. J., LORING, BRALEY, & SHELDON, JJ.

Damages, In contract. Evidence, Competency. Mechanic's Lien.

Where, at the trial of an issue, submitted to a jury in a petition for the establishment of a mechanic's lien for work done and materials furnished in the construction of a building under a contract in writing, as to what sums were due to the petitioner after the giving to the respondent of such credits as he was entitled to, the respondent introduces evidence tending to show that there were omissions and defects in the performance of the contract of such a nature that they could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, the petitioner is entitled to have the jury instructed that there should be deducted from the contract price the amount by which the value of the building as left by him fell short of what that value would have been if the contract had been exactly performed.

At the trial of an issue submitted to a jury in a petition for the establishment of a mechanic's lien for work done and materials furnished in the construction of a building under a contract in writing, where the respondent contends that there were omissions and defects in the performance of the contract of such a nature that it might be found that they could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, the respondent may ask an expert witness what in his opinion would be the fair cost of remedying such conditions so that they would comply with the specifications, such evidence being competent upon the issue, whether there had been a substantial performance of the contract.

PETITION, filed on June 14, 1909, to enforce a mechanic's lien. The petitioners claimed a lien for work done under a contract for the construction of a house for the respondent and for extra work. The contract price was \$2,650 and the alleged value of the extra work was \$418.75.

In the Superior Court there was a trial before *Hitchcock, J.*, of a single issue, namely, "After subtracting all deductions and payments which the respondent is entitled to have credited, if any, how much money are the petitioners entitled to, if any, for the labor furnished and materials furnished, and actually used in the erection of the building on the premises described in the petition." The respondent introduced evidence tending to show the omission of certain small items necessary to complete the con-

tract and also a non-compliance with the contract in failing to use good workmanship in a number of particulars. Subject to an exception by the petitioners, he was permitted to ask an expert witness, "What, in your opinion, would be the fair cost of remedying those conditions you found so that they would comply with the specifications?" The witness answered, "I went over the situation. In order to get the house according to the specifications and plans it would cost in the neighborhood — a close approximate — of around \$300. That is a good close approximate estimate."

The respondent conceded that the petitioners had attempted in good faith to perform the contract.

The judge charged the jury in substance that the petitioners were "entitled to recover the contract price, together with the charges for the extras — whatever you should find that to be — less such an amount as you should find would be necessary to remedy any deficiencies in the performance of the contract."

At the conclusion of the charge, and before the jury were sent out, counsel for the petitioners said to the judge that under the charge given the jury would get the idea that even though the failure to perform the contract was in trivial respects, and the house was practically as good as if the contract had been performed the respondent would be entitled to a deduction of whatever it would cost to rip the work out and make it in accordance with the contract, and that the charge given would open the way for the \$300 deduction mentioned; and asked the judge to instruct the jury that the respondent was entitled to a deduction of the difference between the value of the work as done and its value if done according to the contract. The judge refused to give such instruction or to modify the instructions given, and the petitioners excepted.

The petitioners also excepted to "that part of the charge which states in case of any failure to comply with the plans and specifications and the contract the respondent is entitled to a deduction of the amount that it would cost to remedy the matters not done in accordance with the contract, plans and specifications."

The answer of the jury to the issue submitted to them was "\$150." The lien was established accordingly; and the petitioners alleged exceptions.

H. T. Lummus, for the petitioners.

S. R. Cutler & H. W. James, for the respondent, submitted a brief.

SHELDON, J. In this case no question now is made but that the petitioners substantially performed their contract in good faith; and it seems to have been agreed by both parties that if so, the amount due to them was the contract price, increased by what should be allowed for extra work and diminished by the deduction of the payments which they had received and of what should be allowed for certain defects in their performance. The judge ruled that the latter deduction should be of whatever amount the jury might find to be necessary to remedy any deficiencies in the performance of the contract, and refused to rule, as requested by the petitioners, that the deduction should be of the difference between the value of the work as done and its value if done according to the contract.

The respondent had put in evidence that there were some omissions and several defects in the construction of the house called for by the contract, some of which apparently were of such a character that they could not reasonably have been remedied so as to make the work correspond exactly to the specifications of the contract. If this were so, it is settled by our decisions that under the circumstances here presented the rule of damages contended for by the petitioners was the correct one, that is, as was stated in *Gleason v. Smith*, 9 Cush. 484, there should be deducted from the contract price the amount by which the value of the house as left by the petitioners fell short of what that value would have been if the contract had been exactly performed. *Moulton v. McOwen*, 103 Mass. 587, 598. *Cullen v. Sears*, 112 Mass. 299, 308. *White v. McLaren*, 151 Mass. 553, 557. *Norwood v. Lathrop*, 178 Mass. 208, 210. *Norcross Brothers Co. v. Vose*, 199 Mass. 81, 95, 96. *Bowen v. Kimbell*, 203 Mass. 364, 370. This, as applied to the case before us, is the rule laid down in *Gillis v. Cobe*, 177 Mass. 584, and *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.* 195 Mass. 356, 362.

Exactly the same rule, as to this question, is to be applied to a petition for the enforcement of a mechanic's lien as to an action upon a *quantum meruit* by a builder against a landowner or by the latter against the former for damages by reason of defective con-

struction. See the cases collected by Braley, J., in *Burke v. Coyne*, 188 Mass. 401, 404.

This is not like the cases where a contractor has abandoned his work while yet unfinished, or has left undone some details merely which he ought to have supplied. In such cases the measure of damages to be recovered or recouped well might be the reasonable cost of completing the work. This distinction was pointed out in *Gleason v. Smith*, 9 Cush. 484. See also *Veazie v. Hosmer*, 11 Gray, 396; *McCue v. Whitwell*, 156 Mass. 205, 208; *Olds v. Mapes-Reeve Construction Co.* 177 Mass. 41, 43; *Hebb v. Welsh*, 185 Mass. 335; *Burke v. Coyne*, 188 Mass. 401, 404; and *John Soley & Sons v. Jones*, 208 Mass. 561, 568.

The evidence of Carter as to the cost of remedying the defects which he found in the petitioners' construction was not incompetent. It had a direct bearing upon the issue of substantial performance by the plaintiff, which was then in dispute. See *Handy v. Bliss*, 204 Mass. 513. But its admission made it the more necessary to give to the jury the correct rule for the assessment of damages.

We do not doubt that the contention made by the petitioner is open upon these exceptions. *Brick v. Bosworth*, 162 Mass. 334. *Robertson v. Boston & Northern Street Railway*, 190 Mass. 108.

The exceptions must be sustained; but the new trial should be only upon the first issue and should be confined to the determination of the amount due to the petitioners. All other questions have been properly passed upon. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 391, 392.

Exceptions sustained.

LEWISTON TRUST AND SAFE DEPOSIT COMPANY *vs.* CHARLES H.
SHACKFORD & another.

Suffolk. November 14, 1912. — January 29, 1913.

Present: RUGG, C. J., LORING, BRALEY, & SHELDON, JJ.

Bills and Notes. Evidence, Presumptions and burden of proof, Competency. Practice, Civil, Exceptions.

In an action on a promissory note, where the answer denies that the plaintiff is a holder in due course and alleges that the note was procured from the defendant by fraud of the payee and without consideration, under R. L. c. 73, §§ 69, 72, 76, the burden is on the defendant to prove the fraud on which he relies, and, if he does so, the burden is upon the plaintiff to prove that he acquired the note in due course, including proof not only that he took the note in good faith and for value but also that he had no notice of any defect in the title of the person negotiating it.

In an action on a promissory note, where the defense relied upon is that the plaintiff is not a holder in due course and that the note was procured from the defendant through fraud on the part of an agent of the payee, the defendant may show the dealings between him and the agent of the payee, in which he contends that the fraud was committed, and for this purpose may introduce in evidence a letter received by him from such agent which constitutes a part of the transaction alleged to be fraudulent, without showing that the plaintiff when he took the note had any notice of the contents of such letter.

Upon an exception to the admission in evidence of a certain letter which was offered for the purpose of showing that a promissory note was procured by fraud, if it appears that the letter had no tendency to prove such fraud but contained nothing harmful to the excepting party, its admission will be treated as merely an immaterial error which will not justify this court in sustaining the exception and granting a new trial.

On an exception to the admission in evidence of a certain letter offered for the purpose of showing that a promissory note was procured by fraud, if on the face of the letter its materiality is not apparent, but the other evidence is not reported and it cannot be said that in connection with such other evidence the letter would not have afforded material evidence of fraud, the exception must be overruled, because it is for the excepting party to show that he was aggrieved by the admission of the letter.

CONTRACT on a promissory note for \$500 signed by Charles H. Shackford and Ariana M. Shackford, dated March 4, 1904, payable to the Victoria Acetylene Company six months from date, and indorsed in blank by the Victoria Acetylene Company and also by the Victoria Manufacturing Company, a payment of \$100 on August 17, 1905, being indorsed thereon. Writ dated June 16, 1910.

The answer, besides a general denial, denied that the plaintiff was a holder in due course, and alleged that the note was obtained from the defendants by false and fraudulent representations of the agent of the payee and that the defendants received no compensation for the note.

In the Superior Court the case was tried before *Hitchcock*, J. The defendant Charles H. Shackford died before the trial, and the case was prosecuted against the defendant Ariana M. Shackford alone. The plaintiff introduced evidence tending to show that it was the holder of the note in due course and that neither the plaintiff nor its agents had notice of any equities. The defendant Ariana M. Shackford testified that the note was given in payment of a previous note for the same amount and that there had been three such payments by successive notes, the original note having been dated September 4, 1902. The defendant then introduced evidence tending to show that the original note was procured by fraudulent representations made to her by one Waldron, an agent of the Victoria Acetylene Company, the payee, and offered in evidence a letter written by Waldron to her. The plaintiff objected to the admission of the letter unless it should be proved that the plaintiff or its agent knew of the contents of the letter. The judge admitted the letter, and the plaintiff excepted. The judge ruled that the burden of proving fraud in the inception of the note was upon the defendant.

The judge submitted the case to the jury "with instructions not otherwise objected to." The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. E. Ludden, for the plaintiff.

A. H. Garcelon, for the defendants.

SHELDON, J. There was evidence in this case that the plaintiff was a holder in due course. The defendant, however, had the right to show that the note originally given had been obtained from her by fraud of the payee and that her giving of the note sued on in renewal of the original and the succeeding notes had been done under the influence of the same fraud. If this was shown the burden would be upon the plaintiff to prove that it had acquired title to the note in due course, that is, to prove among other things, not only that it had taken the note in good faith and for value, but also that it had no notice of any defect in the title of the person

negotiating it. R. L. c. 73, §§ 69, 72, 76. *Savage v. Goldsmith*, 181 Mass. 420. *Demelman v. Brazier*, 198 Mass. 458, 464.

The burden was of course upon the defendant to show the fraud upon which she relied; but in order to do this she could show exactly what the dealings had been between her and the payee, or Waldron, the payee's agent, which led to her giving the note and the renewals thereof. So far as these dealings consisted of letters between Waldron and herself, she could put these letters in evidence, not as tending to prove the truth of any narrative of past events therein contained, but as themselves constituting a part of the transaction to be examined and showing the influences under which she had acted. It was not necessary to prove that such letters had been brought home to the plaintiff or its agents; for they were not to operate as admissions of the plaintiff, but simply to make plain as far as they could the circumstances and the inducements under which she gave the notes in question. It was in principle like the evidence admitted in *Biddeford National Bank v. Hill*, 102 Maine, 346. We do not need to follow the rule laid down in *Sylvester v. Crapo*, 15 Pick. 92; *Fisher v. Leland*, 4 Cush. 456; and *Sears v. Moore*, 171 Mass. 514.

The real difficulty is to see how the letter admitted in evidence tended to prove the fraud on which the defendant relied. But, if it had no such tendency, there was nothing in it to harm the plaintiff, and its admission was merely an immaterial error, which would not justify us in granting a new trial. *Burns v. Jones*, 211 Mass. 475. Moreover, the other evidence has not been reported, and we cannot say that this letter, when considered in connection with other testimony, may not have afforded material and perhaps convincing evidence that fraud had been practiced upon the defendant. It is for the plaintiff to show that this evidence ought not to have been admitted and that it was aggrieved by its admission. *Parker v. Kellogg*, 158 Mass. 90. That does not appear upon this record.

It may be of some importance that the case was submitted to the jury under instructions which were not excepted to, and must of course be presumed to have been correct and adequate. It must have been found therefore that the plaintiff was not a holder in due course.

Exceptions overruled.

WILLIAM GLAVIN vs. BOSTON AND MAINE RAILROAD.

Suffolk. November 14, 1912. — January 29, 1913.

Present: RUGG, C. J., LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

One employed as an oiler in a grain elevator, whose duty it is to oil the bearings of the shafting while the machinery is in operation, and who is injured by reason of a lever on which he has rested one foot being shifted from below in obedience to an order of a superintendent, cannot recover from his employer for such injury, if he had engaged to care for himself and fully understood that before stepping upon such a lever he must look out to see that no one was going to shift it from below, and if, under the general system of operating the elevator with which the oiler was familiar, the superintendent could shift such a lever without first ascertaining whether the oiler was using the lever as a temporary foothold.

TORT for personal injuries sustained on February 21, 1908, when the plaintiff was employed as an oiler in a grain elevator of the defendant at or near the Hoosac Tunnel Docks in that part of Boston called Charlestown, the declaration containing three counts, the first under the employers' liability act alleging negligence of a superintendent, the second under the same statute alleging a defect in the ways, works or machinery of the defendant, and the third at common law alleging that the plaintiff was put at work in an unsafe place and without sufficient warning. Writ dated April 13, 1908.

In the Superior Court the case was tried before *Wait, J.* The material facts shown by the evidence are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

A. J. Daly, for the plaintiff.

A. R. Tisdale, for the defendant, submitted a brief.

BRALEY, J. The plaintiff was employed to oil the bearings of the shafting on the first and second floors of the defendant's grain elevator while the machinery was in operation. In oiling the bearing of the shaft where he was at work when injured he was obliged to rest one foot on a narrow platform running parallel with the shaft, and the other foot on the handle of a shifting lever used to

move the belt to and from the driving pulley. The shaft being at an elevation of ten feet or more, the lever was worked from the floor below by use of dependent cords switching the power on or off at the will of the operator. While the plaintiff stood in this position bending over in the act of pouring oil into the oil hole of the bearing, one Gleason, who on the evidence the defendant concedes was an acting superintendent, directed one McNamara to "pull the horse," meaning the lever in question. The order having been obeyed, the plaintiff's footing gave way as the lever moved, and he fell into the machinery. The third count of the declaration is at common law for failure to warn the plaintiff of the dangerous character of his employment. But from his own testimony he was fully instructed when he began work as to the mode of oiling; and the attendant dangers were pointed out. Indeed he very fully stated the conditions, "I always looked to see if I can step out on the lever with safety. It is always expected that I should do that. In going about and oiling up those different shafts I always have been careful and look out before I get out into that position to see whether anybody is going to pull the rope. . . . I had to look out for myself when I oiled up in that way." No additional warning or instructions could have given the plaintiff fuller information of the dangers confronting him, and the defendant is not liable on this count. *Mahoney v. Dore*, 155 Mass. 513. *Regan v. Lombard*, 192 Mass. 319. *Ruddy v. George F. Blake Manuf. Co.* 205 Mass. 172, 181. *Goulding v. Eastern Bridge & Structural Co.* 210 Mass. 52. Nor can the action be maintained on the second count charging a defect in the ways, works or machinery. The mechanical equipment is not shown to have been out of repair, or its adjustment subsequently changed, making the conditions of service more dangerous, while the mode of oiling, even if inherently unsafe or abnormally dangerous, was known to and appreciated by the plaintiff at the time of employment. *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 530, 531. The plaintiff, however, contends, that, even if obvious risks were assumed, he did not assume the chance of injury from the negligence of the superintendent, and therefore he can recover under the first count. *Meagher v. Crawford Laundry Machinery Co.* 187 Mass. 586. The jury undoubtedly would have been warranted in finding that the superintendent knew of the scope of the plaintiff's duties and the

manner in which they must be performed. Ordinarily with such knowledge he should have considered the reasonable probability that the plaintiff might be oiling the shaft when he ordered the power turned on, and the failure to take this precaution would have been evidence for the jury of his negligence. *McPhee v. Scully*, 163 Mass. 216, 219. *O'Brien v. West End Street Railway*, 173 Mass. 105. But it was undisputed that, under the general system of operating the elevator with which the plaintiff was fully acquainted, the superintendent, whenever in his judgment it became necessary, could start the machinery without having ascertained whether the plaintiff might be using the lever as a temporary foothold. The plaintiff had engaged to care for himself, and the order was not in violation of any duty owed to him. *McCann v. Kennedy*, 167 Mass. 23. See *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 535; *Fairman v. Boston & Albany Railroad*, 169 Mass. 170; *Scullane v. Kellogg*, 169 Mass. 544.

The exceptions to the admission of evidence not having been argued must be considered as waived.

Exceptions overruled.

JOHN R. GRAHAM vs. JOSEPH MIDDLEBY, JR., & others.

Norfolk. November 15, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Claiming jury, Exceptions. *Damages*, Recoupment. *Bond*, Damages. *Equity Jurisdiction*.

Where a party to an action at law who has filed a claim for a jury afterwards files a waiver of such claim and the adverse party objects to the waiver and asks for a jury, the question whether there shall be a trial by jury is to be determined by the presiding judge as a matter of discretion and such determination is not a subject for exception.

It is a general rule that a defendant cannot set up a claim in recoupment in reduction of damages unless he could have enforced such claim in an action against the plaintiff.

At a trial for the assessment of damages for the breach of a bond to secure the performance by a corporation of a contract, under which the plaintiff paid to the corporation \$6,000 for a storage battery and the corporation agreed that, if an

injunction should issue restraining the plaintiff from using the battery, the plaintiff should have the right upon notice in writing to the corporation to withdraw from the contract and that the corporation thereupon would repay him the purchase money, the corporation was not a party to the bond nor to the action. It appeared that an injunction issued restraining the plaintiff from using the battery, and that two years thereafter the plaintiff gave to the corporation notice of his withdrawal from the contract and demanded the return of the \$6,000 paid by him under the contract, which was not repaid. It also appeared that during the two years between the injunction and the notice in writing the plaintiff failed to care properly for the battery and that thereby it was rendered valueless. The defendant contended that, under R. L. c. 177, § 10, by which execution on a judgment for the penalty of a bond is to issue only for so much as is "due and payable in equity and good conscience," he was entitled to recoup from the sum payable to the plaintiff the amount of the damages sustained by the corporation by reason of the plaintiff's failure to use reasonable care to keep the battery in good condition. *Held*, that, in the absence of the corporation as a party, the defendant could not be allowed to enforce by way of recoupment a right of the corporation against the plaintiff which it might not be for the advantage of the corporation to enforce in this manner, and that the plaintiff was entitled to full damages undiminished by recoupment. *Whether* the defendant could maintain a suit in equity to compel the corporation to enforce for the defendant's protection any claim it might have against the plaintiff for delay in returning the battery and want of care of it, was referred to as a question on which no opinion was expressed.

CONTRACT, against five defendants, on a bond in the penal sum of \$6,000 given by the defendants to the plaintiff to secure the performance by the Hatch Storage Battery Company of two agreements made by that company with the plaintiff. Writ dated August 15, 1901.

In the Superior Court the case first was tried before *Sherman, J.* The defendant Clare had been defaulted for non-appearance, and the case was defended by the other four defendants. The jury returned a verdict for the plaintiff in the penal sum of the bond with interest; and the four contesting defendants alleged exceptions, which were overruled by this court in a decision reported in 185 Mass. 349.

The four contesting defendants filed a motion that the amount for which execution should issue might be found by a jury. Later the four defendants filed a waiver of this claim for a jury, the defendant Clare was allowed to appear, and all five defendants then objected to having the amount for which execution should issue assessed by a jury and made a motion before *Hardy, J.*, to have the case sent to an assessor. The plaintiff contended that he had a right to have the damages assessed by a jury, because a jury

previously had been claimed by some of the defendants, and filed a claim in writing for a jury trial on this ground. The judge ruled that the plaintiff was not entitled to an assessment by a jury and made an order that the case should be sent to an assessor. To such ruling and order the plaintiff alleged exceptions.

Thomas E. Grover, Esquire, was appointed assessor and filed a report.

The assessor found that on January 26, 1898, the plaintiff and the Hatch Storage Battery Company entered into a contract, by the terms of which the company was to set up in the car house of the Braintree Street Railway Company at South Braintree a storage battery for which the plaintiff was to pay \$6,000. A first payment of \$2,000 was to be made in cash upon the signing of the agreement and the balance of \$4,000 was to be paid as required by the company for the manufacture of the battery. The contract also contained the following clause: "Provided, however, that if any temporary or permanent injunction shall be issued preventing said Graham or any person or corporation to whom he may transfer his rights under this agreement, or to whom he may transfer such storage battery, or preventing said Storage Battery Company from proceeding either with the manufacture or with the use of such battery, said Graham shall, unless such injunction is removed within sixty days, have the right upon giving written notice thereof to said Company to withdraw from this contract, and thereupon he shall be released from any further obligation whatever under the same, and said Company shall in such case repay to said Graham any sums which may have been paid to it by him at the date of such withdrawal."

On the same date the parties also entered into another contract, which provided that the company should furnish counsel, at its expense, to defend the plaintiff, or his transferee, in the event of proceedings being brought against either because of their use of the storage battery.

On the same day the five defendants, who all were directors of the Hatch Storage Battery Company, executed a bond to the plaintiff in the sum of \$6,000, with the following condition: "The condition of this obligation is such that if the Hatch Storage Battery

Company shall in all respects perform and carry out its agreement with said Graham, contained in the contracts to which this bond is annexed, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue." The Hatch Storage Battery Company was not a party to this bond.

The whole \$6,000 was paid to the Hatch Storage Battery Company on or about May 31, 1898, which was before the acceptance of the battery. Before that time the plaintiff had assigned and transferred all his rights under the contracts to the Quincy and Boston Street Railway Company, and that street railway company repaid the \$6,000 to the plaintiff. That street railway company began to use the battery on or about May 1, 1898, and continued such use until August 5, 1899, when it was restrained from further use of the battery by an injunction of the United States District Court for the District of Massachusetts, on the ground that the battery was an infringement of certain letters patent granted to one Charles F. Brush, dated March 2, 1886. This injunction was not dissolved within sixty days from its date, and had not been dissolved at the date of the filing of the assessor's report on August 18, 1910.

On August 5, 1901, two years from the day the injunction went into effect, the plaintiff, on behalf of himself and his assignee, the street railway company, gave due notice in writing to the Hatch Storage Battery Company of his own and his assignee's withdrawal from the contract, and demanded the return of the sums paid to the Hatch Storage Battery Company under the terms of the contract. The money was not repaid, and this action was brought on the bond.

The assessor found that the plaintiff, or his assignee the street railway company, failed to care properly for the battery after the injunction went into effect, and up to the time of the giving of the notice in August, 1901, and that the battery was thereby rendered valueless as a battery. He also found that the battery could have been preserved during the time between the injunction and the giving of the notice, either by taking the elements out of the electrolyte or by running a current regularly through the battery, and that the Hatch Storage Battery Company instructed the plaintiff as to the latter method but that the plaintiff failed to use either method.

The assessor further found that neither the plaintiff nor his assignee ever returned or offered to return the battery.

On all his findings of fact, the assessor ruled that the defendants could not recoup for more than the contract price of the battery, but that it was the duty of the plaintiff, or his assignee, to use reasonable efforts to preserve the battery, and that for the plaintiff's failure to do so, there being no evidence that the battery had any present value, the defendants were entitled to recoup the full amount of the contract price, so that the plaintiff could recover nothing.

The assessor also made a finding that, if he was in error in ruling that it was the duty of the plaintiff or his assignee to preserve the battery during the period of non-use, the plaintiff should recover \$6,000 with interest from the date of the writ.

The plaintiff filed exceptions to the assessor's report, of which the first was as follows: "First: Because the assessor should have found and reported that the plaintiff should have execution in the cause against each and every the defendants, for the amount of the verdict heretofore rendered, together with interest thereon from the day of the date of the rendition thereof at the rate of six per centum per annum; and did not so find and report."

The defendants filed an exception to the exclusion by the assessor of evidence that the market value of the battery at the time of the sale was greater than \$6,000 and to the ruling of the assessor that the defendants could not recoup for more than the contract price.

The case then was heard by *Pierce, J.*, who made an order overruling all the exceptions to the assessor's report, confirming that report, and ordering that upon consideration of the evidence and the assessor's report execution should issue against the defendants in the sum of \$1. The plaintiff appealed from the order. The defendants also appealed.

The case was submitted on briefs.

P. R. Blackmer & J. B. Sullivan, for the plaintiff.

A. M. Lyman, for all the defendants, except *Clare*.

SHELDON, J. The exception to the refusal of the judge to allow the plaintiff to file a claim for a trial by jury cannot be sustained. That question was to be determined by the judge as a matter of discretion and is not the subject of exceptions. *Bailey v. Joy*,

132 Mass. 356. *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591. *Graham v. Lord*, 170 Mass. 1. *Stevens v. McDonald*, 173 Mass. 382. *Thompson v. King*, 173 Mass. 439, 443. *Galagher v. Silberstein*, 182 Mass. 20. *Dolan v. Boott Cotton Mills*, 185 Mass. 576. *Clark v. Baker*, 192 Mass. 226.

The question which lies at the foundation of the case is whether the defendants have the right to recoup from the sum which they are held to pay to the plaintiff the amount of the damages sustained by the Hatch Storage Battery Company in consequence of the plaintiff's failure to use reasonable diligence to preserve in good order the battery which he had bought from that company.

The amount of such damages, even if they had been liquidated, could not have been set off by these defendants against the claim of the plaintiff in an ordinary action at law, although they were merely sureties for the company. That is settled by our decisions, and we need not consider whether the courts of some other States have not laid down a different rule. *Warren v. Wells*, 1 Met. 80. *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. 39. *Walker v. Leighton*, 11 Mass. 140. *Rawson v. Rawson*, 105 Mass. 214, 215. *Barnstable Savings Bank v. Snow*, 128 Mass. 512. *Brooks v. Stackpole*, 168 Mass. 537. *Simmons v. Shaw*, 172 Mass. 516. *McGuinness v. Kyle*, 208 Mass. 443.

But the defendants contend that the bond upon which they are held was by its terms tied to the contracts between the plaintiff and the Hatch Company; that the claim which they set up grew out of the plaintiff's obligation under those contracts, that is, his alleged obligation to take at least reasonable care of the battery so as to return it in proper condition if he elected to withdraw from his contract of purchase; that accordingly the claim against him grew out of the same transaction as his purchase of the battery and so could have been made a ground of recoupment by the company if the plaintiff had sued it directly for the return of the price paid by him, as he might have done; that as the bond given by the defendants, though a different instrument, constituted in reality a part of the transaction between the plaintiff and the Hatch Company, and as the defendants have the right to make available to themselves all the securities and all the means of payment held by the plaintiff against the Hatch Company, so they also have the right to be exonerated by the Hatch Company,

their principal, from their liability to the plaintiff and for that purpose to enforce, so far as necessary, all the rights of the Hatch Company against the plaintiff for their indemnity and in reduction of their liability, just as the Hatch Company might have done. And they point out that although this is an action at law and their liability upon the bond has been settled (*Graham v. Middleby*, 185 Mass. 349) upon principles of strict law, yet execution is to issue only for what is found to be "due and payable in equity and good conscience;" R. L. c. 177, § 10; and so they insist that the question now raised is to be settled by the rules of justice and equity. *Merrill v. McIntire*, 13 Gray, 157. *Austin v. Moore*, 7 Met. 116, 125. *Hatch v. Attleborough*, 97 Mass. 533, 538. *Leonard v. Whitney*, 109 Mass. 265. *Commonwealth v. Gould*, 118 Mass. 300, 307. *Quinn v. Brennan*, 148 Mass. 562. *Forbes v. Ware*, 172 Mass. 306.

There is force in the reasoning of the defendants. It was substantially applied and an equitable defense on similar grounds was sustained in *Bechervaise v. Lewis*, L. R. 7 C. P. 372. Some decisions made elsewhere tend more or less strongly to support it. *Downer v. Dana*, 17 Vt. 518. *Concord v. Pillsbury*, 33 N. H. 310. *Hollister v. Davis*, 54 Penn. St. 508. *M'Hardy v. Wadsworth*, 8 Mich. 349, 353. *Cole v. Justice*, 8 Ala. 793. *Waterman v. Clark*, 76 Ill. 428. *Meyer v. Stookey*, 3 Ill. App. 336. It may be, though that question will not be decided until it shall have arisen, that in a proper case, with proper parties before the court, where irremediable wrong otherwise would be done to a surety or to one under a merely indirect or secondary liability, we might be disposed to stretch the equitable doctrine even to the extent that here has been contended for. But the general rule unquestionably is that no one can set up a claim of recoupment by way of defense unless he could have enforced the alleged liability by a direct action thereon. *Sawyer v. Wiswell*, 9 Allen, 39, 42. *McCarthy v. Henderson*, 138 Mass. 310, 313. *Thayer v. Jewett*, 22 Maine, 19. *Kinne v. New Haven*, 32 Conn. 210. *Elliott v. Brady*, 192 N. Y. 221. *Kinzie v. Riely*, 100 Va. 709. *Tully v. Excelsior Iron Works*, 115 Ill. 544, 549, 550. *Gibbony v. Wayne*, 141 Ala. 300. *D. M. Osborne Co. v. Bryce*, 23 Fed. Rep. 171. The doctrine contended for is one of equity merely, and will be applied only so far as is necessary for the proper protection of a surety and only so far as

can be done without injury to the rights of others having equal or superior equities to those invoked in the special case. *Coffin v. McLean*, 80 N. Y. 560. *Orvis v. Newell*, 17 Conn. 97. *Coates's Appeal*, 7 W. & S. 99. *Eaton v. Hasty*, 6 Neb. 419. *Leggett v. Humphreys*, 21 How. 66. *Joyce v. Cockrill*, 92 Fed. Rep. 838, 845. It was so restricted in a State where the decisions have tended as strongly as any others to support the defendants' contention. *Graff v. Kahn*, 18 Ill. App. 485.

In this case, the battery in the hands of the plaintiff, even after he had exercised his option to withdraw from his contract of purchase, was in no sense a security or means of payment held by him to secure the payment for which the defendants have bound themselves. The contention of the defendants is that when he withdrew from the contract which alone gave to him or his assignee any right to hold the battery, it became his duty to surrender it to the company, at least upon demand. For a failure to do this, or for any failure to protect the battery from injury so far as it was his duty to do so, he was liable to the company. For a breach of his duty in either of these respects the company could hold him liable in a direct action against him; or, if it so elected, it may be that it could have used its claim against him as a basis of recoupment if he had sued it for the recovery of the money which he had paid to it. But it was for the company to elect which one of these courses it would adopt. *Gillespie v. Torrance*, 25 N. Y. 306. *Lasher v. Williamson*, 55 N. Y. 619. *Elliott v. Brady*, 192 N. Y. 221. *Baltimore & Ohio Railroad v. Bitner*, 15 W. Va. 455. If the company had chosen the latter course, its claim could have been availed of only to the extent of meeting the plaintiff's demand; *O'Connor v. Varney*, 10 Gray, 231; and the company hardly would have done so if (as in the case before us there was evidence tending to show) in order to get its goods upon the market it really had sold the battery to the plaintiff for a price much less than its value. In that event, and if the company deemed the claims set up by the defendants to be well founded, it doubtless would have preferred to submit to the demand of the plaintiff for reimbursement and seek to hold him for the whole value of the battery. But if the defendants can, without the concurrence of the company, by their own election made in an action to which the company is not a party, exercise

an option which the company has not as yet seen fit to exercise, perhaps has not yet been called upon to exercise, a great injustice may be done either to the plaintiff or to the company. If the company is not bound by what is done in this action, to which so far as appears it is a mere stranger, and if the defendants shall succeed in maintaining their claim to recoupment, the plaintiff will remain liable to the company for any breach of his obligation to it, and after having allowed to the defendants damages for that breach to the extent of his demand against them, may be compelled to pay to the company full damages for the same breach, perhaps to a greater amount than will have been allowed against him in this action. If, however, the company is bound by the election of the defendants and so cannot hereafter maintain its action against the plaintiff for the liability which it necessarily will have been found that he was under to it, then the company will, without its consent, by the action of its sureties and former directors in a suit of which it had no notice or knowledge, have been deprived of a vested right of action, perhaps (as some of the evidence indicates) of considerably greater value than the amount of the relief thus afforded to its sureties. Neither of these alternatives ought to be allowed.

Whether these defendants could by a suit in equity compel the company to enforce for their protection any claim it may have against the plaintiff by reason of its transactions with him, is not before us, and we express no opinion upon the question.

The plaintiff's exception to the refusal to allow him a trial by jury must be overruled. On the appeals from the order of the Superior Court upon the assessor's report, that order must be reversed; and an order should be entered upon the facts found by the assessor, sustaining the plaintiff's first exception to the assessor's report and overruling all the other exceptions thereto of each party as being either unfounded or immaterial, and ordering execution to issue in favor of the plaintiff against the defendants for the sum of \$6,000 with interest from the date of the writ, not exceeding however the amount of the verdict with interest thereon.

So ordered.

ARTHUR P. HAWES vs. INHABITANTS OF MILTON.

Suffolk. November 15, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way, Public: defect. Bridge. Municipal Corporations, Officers and agents.

A town, which is required by statute to maintain the half of the draw of a bridge that lies within its limits, is not liable under R. L. c. 51, § 18, for an injury to a traveller on the bridge caused by the temporary opening of a trap door on its side of the draw for the purpose of adjusting the sections of the draw after a vessel had passed through it, as such a transitory condition does not constitute a defect in the bridge within the meaning of the highway act.

A competent draw tender employed to operate a draw by a town, upon which the duty is imposed by statute to maintain the draw and employ such a draw tender, acts in the performance of his duties as a public officer and is not an agent of the town, and, if a traveller is injured by the negligence of such draw tender in operating the draw, his only remedy is against the draw tender personally.

TORT under R. L. c. 51, § 18, for injuries to an automobile of the plaintiff sustained on August 15, 1907, at about 7.30 P. M., when the plaintiff was driving the automobile over the Granite Avenue Bridge, which crosses the Neponset River between that part of Boston called Dorchester and the town of Milton, by reason of a trap door on the Milton half of the bridge having been left open, standing at an angle of about forty-five degrees with the surface of the bridge with its higher end about one and a half feet above such surface. Writ dated July 13, 1908.

In the Superior Court the case was tried before *Lawton, J.* The draw itself was closed at the time of the accident. The trap door which was left open on the Milton side was from two to three feet wide and had to be opened when the draw was opened in order to allow the part of the draw on the Milton side to be raised. There was a similar trap door on the Dorchester side, which was closed at the time of the accident.

St. 1865, c. 192, authorized the county commissioners for the county of Norfolk to construct the bridge in question. Section 3 of that statute is as follows:

“Section 3. Upon due notice given by said [county] commissioners to the clerk of the towns in which said bridge lies, that said

bridge has been reconstructed and is in substantial repair so that the same is safe and convenient for travel, such towns shall each thenceforth be responsible for the care, maintenance and repair of the portion of said bridge lying on its own side of the same and extending to the centre of the draw, and they shall at their joint expense provide draw-tenders for said draw, and other necessary agents; and said towns shall be jointly liable to raise the draw and afford all necessary and proper accommodation to vessels having occasion to pass the same by day or by night, and shall keep a sufficient light for vessels at said draw; and if any vessels shall be unreasonably delayed or hindered in passing said draw by the negligence of said towns or their agents in discharging the duties enjoined by this act, the owners or masters of such vessels may receive reasonable damages therefor of said towns in an action of tort before any court proper to try the same."

The facts in regard to the happening of the accident are stated in the opinion.

At the close of the evidence the judge ruled that upon all the evidence the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff excepted to this ruling, and the judge reported the case, with the stipulation that, if the ruling and order of the court were wrong, judgment should be entered for the plaintiff in the sum of \$500; otherwise, that judgment should be entered for the defendant.

W. R. Bigelow, for the plaintiff.

G. C. Coit, for the defendant.

BRALEY, J. The defendant by the St. 1865, c. 192, § 3, was required not only to care for and maintain that portion of the drawbridge extending to the centre of the draw and lying within the limits of the town, but under R. L. c. 51, §§ 1, 18, to keep it in a reasonably safe condition for the use of travellers. If, without deciding, it be assumed that the plaintiff's automobile was being operated lawfully and the question of his due care was for the jury, yet he cannot recover without some proof that the damage to his property was caused by either a defective condition of the bridge which in the exercise of ordinary diligence the defendant should have known of and remedied, or by the negligence of some person for whose acts the town can be held liable. *Lyman v. Hampshire*, 140 Mass. 311. *Stoliker v. Boston*, 204 Mass. 522.

The facts are not in dispute. The county commissioners constructed the bridge as directed by the Legislature, with a draw in the centre to be operated by a draw tender provided at the joint expense of the defendant and the town of Dorchester, which was required to care for and maintain the other portion of the bridge "lying on its own side." It was further enacted that "said towns shall be jointly liable to raise the draw and afford all necessary and proper accommodation to vessels having occasion to pass by day or by night." The draw equipped with trap doors estimated to have been from two to three feet wide and extending transversely the width of the bridge, opened in two parts which had to be raised and lowered separately.

The exceptions recite that "the opening of the trap doors was a necessary part of the operation of the drawbridge, and there was no evidence of any defect in the bridge or in any of the machinery by which the draw was operated."

In the early evening of the day of the accident the plaintiff was driving in his automobile with the lamps lighted, and slackened speed, as he approached the bridge; but the draw, very shortly before, had been opened to permit the passage of a boat, and through the inadvertence of the draw tender the sections when closed did not properly lock and overlap. To bring them into adjustment it became necessary again to raise and lower each section. The trap doors at each end were accordingly opened, but apparently there was not sufficient time to close the door on the defendant's side before the automobile came by and struck the open trap.

If the aperture caused the highway to be unsafe for the use of vehicles, this condition was of transitory duration, and the opening of the draw for the passage of vessels or for its readjustment immediately after the vessel had passed having been necessary and lawful, a defect within the meaning of the statute for which the town should be held responsible has not been shown. *Butterfield v. Boston*, 148 Mass. 544.

The plaintiff must rely therefore on the alleged carelessness of the draw tender. But, if the jury could have found that he was careless because he did not seasonably ascertain whether travellers were approaching or were attempting to pass, the plaintiff does not allege that he was incompetent, and his negligence cannot be

imputed to the town. If by § 3 it is made responsible in reasonable damages to the owners or masters of vessels "unreasonably delayed or hindered in passing said draw" through his negligence, he is not as to travellers the servant or agent of the defendant, but in the discharge of his duties acts as a public officer, personally answerable for his own misfeasance. *Nowell v. Wright*, 3 Allen, 166. *Butterfield v. Boston*, 148 Mass. 544. *Moymihan v. Todd*, 188 Mass. 301.

Judgment for the defendant on the verdict.

F. W. STOCK AND SONS vs. LOUIS SNELL.

Suffolk. November 18, 1912. — January 29, 1913.

Present: RUGG, C J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Pleading, Civil, Declaration: account annexed, special damages. *Damages*, In contract: special. *Practice, Civil*, Verdict, New trial.

Under R. L. c. 173, § 6, cl. 8, a plaintiff cannot recover under an account annexed for the breach of an executory contract to buy certain goods from the plaintiff, but must declare specially.

In an action of contract to recover damages for the failure of the defendant to receive and accept certain goods which the defendant had ordered in writing and agreed to buy from the plaintiff, where no special damages are alleged, the measure of damages is the difference between the contract price of the goods and their market value at the time and place where they were to have been delivered.

In an action of contract to recover damages for the breach of an executory contract, where the declaration contains a special count on which the plaintiff is entitled to recover and a count on an account annexed on which he is not entitled to recover, and, the case having been submitted to the jury on both counts, a general verdict is returned for the plaintiff, exceptions of the defendant will be sustained and a new trial will be granted, because it cannot be known on which count the verdict was returned.

CONTRACT, by a corporation, having a usual place of business in Boston, doing business as a miller and having its mills at Hillsdale in the State of Michigan, against a wholesale flour dealer engaged in business at Fall River. Writ dated May 12, 1911.

The amended declaration was in three counts, which were as follows:

"Count 1. And plaintiff says that on October 2, 1909, the defendant gave to the plaintiff a written order for the sale and delivery by the plaintiff to the defendant, F. O. B. at Fall River, Massachusetts, of five carloads of 'Mikota' brand flour, manufactured by the plaintiff, each car to contain two hundred and five barrels, at a price to the defendant of five dollars and fifteen cents per barrel less the freight charges for railroad transportation, and the defendant was to accept and receive the delivery of said five carloads of said flour between said October 2, 1909 and January 30, 1910, and the defendant was to pay the plaintiff for the said flour by acceptance and payment of drafts drawn by the plaintiff upon the defendant, on the arrival of each said shipment at said Fall River;

"That the plaintiff accepted the said order of the defendant, and forwarded to the defendant at Fall River, Mass., said five carloads of said 'Mikota' brand flour, containing ten hundred and twenty-five barrels, and the defendant accepted, received, and paid the plaintiff for, four of said carloads of flour, containing eight hundred and twenty barrels, but the defendant has neglected and refused to carry out the terms of his said contract with the plaintiff, and refused to accept the delivery of the fifth carload of said flour, containing two hundred and five barrels, whereby the plaintiff is greatly damaged.

"Count 2. And the plaintiff says that on October 18, 1910, the defendant gave to the plaintiff a written order for the sale and delivery by the plaintiff to the defendant, F. O. B. at Fall River, Massachusetts, of ten hundred and twenty-five barrels of 'Mikota' brand flour, manufactured by the plaintiff, to be shipped in carload lots containing two hundred and five barrels to each car, at a price to the defendant of five dollars and twenty-five cents per barrel less the freight charges for railroad transportation; the final and total shipment thereof to be made within ninety days from said October 18, 1910, and the defendant was to accept and receive the delivery of each shipment, and was to pay the plaintiff therefor as stated in said order:

"That the plaintiff accepted the said order of the defendant, and thereupon forwarded to the defendant two carloads of four hundred and ten barrels of said flour, which were accepted and received and paid for by the defendant in accordance with the

terms of said order; and the plaintiff has always been ready and willing to perform its part of said contract, but the defendant has neglected and refused to carry out the terms of his said contract with the plaintiff, and has refused to accept and receive the delivery of the remaining six hundred and fifteen barrels of said flour, whereby the plaintiff is greatly damaged.

"Count 3. And the plaintiff says the defendant owes it seven hundred and fifteen dollars and fifteen cents, according to the account hereto annexed."

The account annexed to the third count was as follows:

"Louis Snell

To F. W. Stock & Sons, Dr.

1910

"Item 1.	June 15	To loss on resale of 205 bbls 'Mikota' flour at \$5.15 less .45 per bbl.	\$ 92.25
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1911

Item 2.	Feb. 1	" loss on resale of 615 bbls 'Mikota' flour at \$5.25 less .65 per bbl	399.75
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1910

Item 3.	July	" Cost reselling 205 bbls 'Mikota' flour at .10	20.50
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Item 4.		" Demurrage on car re- fused	7.00
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Item 5.		" Protest charges on draft	2.02
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Item 6.		" Expense carrying flour 4 months overtime 5¢ per bbl monthly @ .20	41.00
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1911

Item 7.	Feb. 1	" Cost reselling 615 bbls 'Mikota' flour at .10	61.50
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Item 8.		" Protest charges on draft	2.02
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Item 9.	" Interest 30 days, Dec. 30, 1910 on car 5364 refused at 6%	4.96
Item 10.	" Demurrage and freight to Boston	84.15
Item 11		<hr/> 715.15"

In the Superior Court the case was tried before *Bell, J.* There was evidence in support of the allegations contained in the first two counts of the declaration. At the close of the evidence the defendant asked the judge to make, among others, the following rulings:

"3. That on the third count the plaintiff cannot recover and the verdict should be for the defendant.

"4. That the plaintiff cannot recover under his third count for Item 1 of the account annexed.

"5. That the plaintiff cannot recover under his third count for Item 2 in the account annexed."

Then followed requests numbered from six to thirteen inclusive, asking respectively for rulings that the plaintiff could not recover under his third count for each of the items of the account annexed from Item 3 to Item 10 inclusive.

The judge refused to make any of these rulings except those numbered four and five, which he gave as instructions to the jury, also instructing them that the plaintiff could not recover under those two items [items one and two of the account annexed] for the loss on the resale of the flour, as the measure of damages was the difference between the contract price and the market price at the time when the contract was broken by the defendant.

The jury found a general verdict for the plaintiff in the sum of \$581.68; and the defendant alleged exceptions.

The case was submitted on briefs.

C. H. Cronin, for the defendant.

H. L. Baker & F. K. Rice, for the plaintiff.

SHELDON, J. The rulings asked for by the defendant numbered from three to thirteen inclusive should have been given. Not merely the first and second, but all the items in the account annexed to the third count of the plaintiff's amended declaration

were particulars of special damages claimed by the plaintiff for the breach by the defendant of the two written contracts set out in the first and second counts. As these contracts had not been performed and the title to some of the goods described had never become vested in the defendant, the plaintiff could not recover upon his present claims in an action upon an account annexed. R. L. c. 173, § 6, cl. 8. The rule to be applied was stated by Shaw, C. J., in *Moulton v. Trask*, 9 Met. 577, 580, and has been uniformly followed in our decisions. *Morse v. Potter*, 4 Gray, 292, 293. *Stearns v. Washburn*, 7 Gray, 187. *Bowen v. Proprietors of South Building*, 137 Mass. 274, 276. *Field v. Banks*, 177 Mass. 36.

No special damages were alleged in the first or second counts, and accordingly the measure of damages under each of these counts was the difference between the contract price and the market price of the flour refused by the defendant at the respective times and places at which it was to have been delivered. *Tufts v. Bennett*, 163 Mass. 398. *Barrie v. Quinby*, 206 Mass. 259, 268.

Much of the plaintiff's argument is irrelevant. The bill of exceptions contains the material evidence introduced at the trial, as was not the case in *Wade v. Smith*, ante, 34. And, as the third count should not have been submitted to the jury at all, cases like *Khron v. Brock*, 144 Mass. 516, give the plaintiff no comfort.

It may be that the verdict was justified under the first and second counts; but it was a general one, and we cannot tell upon what counts it was rendered, or what items, other than the first and second of the account annexed to the third count, were included in it. *Lynch v. Allyn*, 160 Mass. 248, 255. *Fairman v. Boston & Albany Railroad*, 169 Mass. 170, 178. *Hagar v. Norton*, 188 Mass. 47, 51. Accordingly there must be a new trial.

As both the pleadings and the evidence may be different at another trial, we do not deem it expedient to attempt to settle now the other questions which have been raised.

Exceptions sustained.

JOSEPH LUCARELLI vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway. Evidence, Presumptions and burden of proof.

Where, at the trial of an action against a street railway company for injuries to a boy ten years of age who was run into by a car of the defendant, there is evidence tending to prove that the boy as he was following others upon a cross walk back of a car of the defendant that had stopped there, to cross the street over a parallel track of the defendant, was struck on such other track by a car whose gong he had not heard sounded and whose approach he had not heard, the questions, whether the boy was in the exercise of due care and whether the defendant was negligent, are for the jury.

Where, at the trial of an action against a street railway company by a boy ten years of age when injured to recover for injuries alleged to have been caused by his being run into, after passing behind a car of the defendant to cross a street, by another car approaching on a parallel track, the only testimony on the question of whether the gong on the second car was rung is the testimony of the plaintiff, who states that he did not hear the approach of the second car nor hear its gong sounded, and the testimony of a witness for the defendant who was beside the motorman in the front vestibule of the second car and who stated that "the motorman had been ringing the gong," the jury are warranted in finding that the gong was not sounded.

TORT for personal injuries alleged to have been caused by the plaintiff being run into by a street car of the defendant as he was crossing Meridian Street at its intersection with Paris Street in that part of Boston called East Boston. Writ dated April 3, 1911.

In the Superior Court the case was tried before *Irwin, J.* The only witness for the plaintiff on the question of liability was the plaintiff. He testified in direct examination, on the subject of warning of the approach of the car, as follows: "Q. Whether or not you heard anything; whether or not you heard the car approaching, — the second car? A. No, sir. — Q. You did not? A. No, sir. — Q. Whether or not you heard the gong being sounded? A. No, sir. — Q. Whether or not you heard anybody shout to you? A. No, sir." A motorman in the employ of the defendant, not the motorman operating the car, testified that he was in the front vestibule of the car at the time of the ac-

cident, and that he had applied the emergency brakes, and "that the motorman had been ringing the gong." He also testified that the motorman who had operated the car had gone to Oklahoma shortly after the accident to the plaintiff.

The other material facts are stated in the opinion.

At the close of the evidence the judge refused to rule that upon all the evidence the plaintiff could not recover, or that there was no evidence that the plaintiff was in the exercise of due care, or that there was no evidence that the defendant was negligent. The jury found for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

F. M. Ives, for the defendant.

H. A. Kenny, for the plaintiff, submitted a brief.

BRALEY, J. The jury upon conflicting evidence would have been warranted in finding that at the time of the accident the plaintiff, a boy some ten years of age, while a traveller in the street in which were the double tracks of the defendant's railway, had occasion to pass from one side to the other. Before leaving the curb he looked across, and, seeing only an inbound car which had stopped at the cross walk, started over the cross walk, following travellers who preceded him. Upon passing the stationary car he reached the outward track where he was struck and injured by an outbound car, the motorman of which gave no warning of its approach.

The degree of care called for was that of the ordinarily prudent boy of his age. *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 494. *Angelary v. Springfield Street Railway*, 213 Mass. 110, and cases cited. And it has been decided that under substantially similar circumstances this question is for the jury. *McDermott v. Boston Elevated Railway*, 184 Mass. 126. *Sullivan v. Boston Elevated Railway*, 192 Mass. 37, 40. *Burns v. Worcester Consolidated Street Railway*, 193 Mass. 63. *Purcell v. Boston Elevated Railway*, 211 Mass. 79.

The question of the defendant's negligence also was rightly submitted to them. It must have been apparent to the motorman, that the inward car had stopped, and he knew, of course, that his car must pass over the crossing. In the concurrent use of the street the defendant was bound to take proper precautions to avoid injury to travellers, and a view of the oncoming car by those approaching from the direction of the inward

track might have been so obstructed, as the jury could find, by the stationary car, that if the usual warning was not given travelers would be unaware of the danger until too late to escape injury. *Burns v. Worcester Consolidated Street Railway*, 193 Mass. 63. *Horsman v. Brockton & Plymouth Street Railway*, 205 Mass. 519, 521. The only evidence that the gong was rung came from a witness for the defendant. But the jury were not bound to believe him, and, the order in which evidence is introduced being immaterial, they furthermore could say that it was not rung, because in answer to questions asked in his direct examination the plaintiff testified that he did not hear it. *Slattery v. New York, New Haven, & Hartford Railroad*, 203 Mass. 453, 459.

Exceptions overruled.

CURTIS AND POPE LUMBER COMPANY vs. VICTOR WOLMER & others.

Suffolk. November 19, 1912. — January 29, 1913.

Present: HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Mechanic's Lien.

A dealer in lumber made with the owner of certain land a contract to furnish the lumber for the construction of a dwelling house on the land. More than thirty days after the house practically was finished, at the request of the owner and in substitution for lumber called for by the contract which he had not delivered, the dealer furnished lumber which was used to erect enclosures for receptacles for garbage and ashes placed twenty-five feet from the house and in no way attached to the realty or to any other structure, and within the next thirty days filed under R. L. c. 197, § 6, a statement to preserve his lien for his entire claim against the owner. A petition to establish the lien, afterwards filed, was referred to an auditor, who found that the statement was seasonably filed. A single issue, whether the lumber last delivered was furnished in good faith and under the contract, was submitted to a jury who answered it in the affirmative. A hearing then was had by a judge and conflicting evidence was offered as to whether the use, in connection with dwelling houses, of such enclosures as were built with the lumber last delivered, was general. The judge found that such use was not general, that the lumber last delivered was not used in the erection of a structure upon the land, and that therefore the statement was not filed in the time prescribed by R. L. c. 197, § 6; and dismissed the petition. *Held*, that the findings of the judge were warranted and that the petition was dismissed properly.

In a petition for the establishment of a mechanic's lien for lumber alleged to have been furnished under a contract and used for the construction of a dwelling house,

if the determination of the question, whether a statement made under R. L. c. 197, § 6, to preserve the lien was filed seasonably, depends upon whether the lumber last delivered was used for the construction of a structure upon the land, and it appears that it was used for the construction of enclosures for receptacles for garbage and ashes which were set apart from the dwelling house and were not attached to the realty, the fact that a single issue, whether the lumber last delivered was furnished by the petitioner in good faith and under the contract, was submitted to a jury who answered it in the affirmative, does not preclude the respondent, at the hearing by a judge of an application for the establishment of the lien, from introducing evidence tending to show, nor the judge from finding upon conflicting evidence, that the enclosures for whose construction that lumber was used were not structures upon the land within the meaning of R. L. c. 197, § 1.

DE COURCY, J. On May 2, 1904, the petitioner entered into a contract with the respondent Wolmer to furnish certain lumber to be used in the erection of three dwelling houses on a parcel of land then owned by him. Subsequently Wolmer divided the land into three lots, mortgaged one to the respondent Vose and the other two to the Charlestown Savings Bank; and these mortgagees, through foreclosure proceedings, have become owners in fee, and have intervened to contest the petitioner's claim of lien upon the property, — the respondent Wolmer having been defaulted.

Lumber was delivered under the petitioner's contract, at frequent intervals from May 6 until July 20, 1904, at which time one of the houses was substantially completed. No other delivery was made until September 14, when fifty feet of the undelivered spruce and also four hundred and one feet of matched hard pine boards, in place of hemlock boards named in the original contract, and all of the value of \$9.25, were furnished at Wolmer's request. The statement of lien required by R. L. c. 197, § 6, was filed in the Registry of Deeds on September 29, and a petition to enforce the lien was brought on November 8. Subsequently the case was sent to an auditor,* and after his report was made there was submitted to a jury this issue of fact: "Was any part of the material supplied by the Curtis & Pope Lumber Company on September 14, 1904, furnished under the contract of May 2, 1904, and in good faith?" To this the jury answered, "Yes." The action was then heard by a judge of the Superior Court,† who found for the respondents on the ground that the petitioner had not established its lien, and accompanied his finding with a memorandum of facts.

* Joseph R. Churchill, Esquire.

† McLaughlin, J.

1. As to the petitioner's exception to the findings of fact: It is not disputed that the claim of lien is dependent upon the lumber furnished September 14. This was wholly used in the making of certain receptacles or boxes, for the use of the tenants, "designed for the reception and temporary deposit of ashes, garbage and offal." There was one of these about twenty-five feet in the rear of each house, resting upon the ground near the fence, and not fastened to anything; and each was about five feet long, two feet wide, three feet high in front and three and one half feet in the back, and large enough to hold two barrels. Upon conflicting evidence the judge found that while such receptacles for ashes and garbage were used to a very considerable extent, such use was not general, and that the contract which Wolmer made for the erection of the buildings did not provide for them, although it was not unusual to specify them in building contracts. We cannot say that these and the other conclusions of fact were not warranted by the evidence before us; and the judge had an opportunity, which we do not have, to estimate the credibility of the witnesses. *Schendel v. Stevenson*, 153 Mass. 351.

2. The second ruling of law,* requested at the close of the evidence, was rightly denied. The answer of the jury established the fact that some at least of the material supplied by the petitioner on September 14 was a part of the lumber contracted for on May 2, and was furnished in good faith. Presumably this issue was prepared to meet the contention of the respondents that this last lumber was furnished collusively and fraudulently for the purpose of reviving a lien that had been dissolved by the failure to file a statement within thirty days after July 20, when the last prior delivery was made. But there were other facts for the petitioner to prove in order to maintain its lien; and the auditor's finding †

* This ruling was as follows: "2. The answer of the jury to the question submitted settles everything which may be considered a question of fact and leaves no question before this court except, whether, as a matter of law, the ash houses might be held to be a part of the structures, as that word is used in the mechanics' lien law."

† The auditor's finding as to the materials supplied on September 14 was as follows: "The inference is easily drawn that these materials were furnished with the ulterior purpose of preserving its lien; and I so find, as requested by the defendants. Nevertheless I find that the substitution of hard pine for hemlock boards was approved by both parties to the contract, that the price

as to these was only *prima facie* evidence. The most important were those bearing upon the question whether this material was actually used in the erection of a building or structure upon the land, within the meaning of the lien statute. If the petitioner desired to have such further facts determined by a jury he should have applied for issues thereon. R. L. c. 197, § 15. *McAuliffe v. Dyme*, 179 Mass. 214.

3. The first ruling * requested involved certain elements of fact, such as the description, location, use and attachment to the realty of these receptacles. See *Henry N. Clark Co. v. Skelton*, 208 Mass. 284. In his memorandum the trial judge states: "On all the evidence I find that these 'houses' or receptacles were never applied so as to constitute parts of the building aforesaid, nor was there any structural connection between them and said buildings, nor were said boxes or the materials of which they were constituted used in the erection upon said land of said buildings, or any of them." In order to base a lien upon the materials that entered into these boxes or receptacles it was necessary for the petitioner to show that its lumber entered into the completed structure and became a part of the realty. *Kennedy v. Commonwealth*, 182 Mass. 480. Accordingly it has been decided that a lien could not be maintained for portable ranges where it did not appear that they "were to be furnished as parts of the several houses in which they were put" or were "applied so as to constitute parts of the buildings." *Boston Furnace Co. v. Dimock*, 158 Mass. 552. In *Beatty v. Parker*, 141 Mass. 523, cited by the petitioner, a lien was maintained for the laying of a drain pipe because this was found to be necessary to the house and a part of it, and was included in the building contract. And in *Reid v. Berry*, 178 Mass. 260, a lien for grading was allowed to stand as being

or value thereof and the adaptation to the proposed use were the same, and that they, with the fifty feet of spruce, were furnished in compliance with the contract of May 2 and in good faith, and I find and rule, were also actually used in the erection of said three dwelling houses, and that the statement of lien was therefore seasonably recorded."

* The first ruling requested was as follows: "1. That upon all the evidence as a matter of law, each of the ash houses which were constructed in the rear of the three houses upon the land described in the petition for materials furnished by the petitioner is a part of the buildings or structures erected upon the land within the meaning of" R. L. c. 197.

"reasonably necessary to the proper construction and occupation of the house," and consequently "considered as a part of its erection." In the present case the receptacles were at a distance from and in no way structurally connected with the buildings. They were personal property, moved upon and not attached to the real estate. They were not included in the building contract, and presumably were not contemplated when the contract for lumber was made with the petitioner, as it brought an action at law on the contract before the lumber for these boxes was furnished. Their use was not general, much less was it necessary for the dwelling houses; and they served merely to cover the ash barrels and garbage cans. Upon the evidence and findings of fact we cannot say that the judge erred in refusing to rule as matter of law that these receptacles were a part of the buildings or a permanent erection intended for the improvement of the real estate on which a lien is claimed.

Exceptions overruled.

W. B. Grant, (W. F. Mooers with him,) for the plaintiff.

J. K. Berry, (W. W. Storer with him,) for the defendants.



SIMON RIDGE vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 20, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. Evidence, Presumptions and burden of proof.

At the trial of an action at common law against a street railway company by an employee who was injured in a car barn by being run into by a shifting table which started unexpectedly as he was passing in front of it in the course of his duties, if the plaintiff has testified "that he could not say whether" on the occasion in question the operator of the table, a fellow servant, "started the table or whether it started up of its own accord," and the remaining evidence leaves it a matter of conjecture whether the table started automatically because of a defect in it or whether the starting was due to negligence of the fellow servant, a verdict must be ordered for the defendant; and the exclusion of evidence, offered by the plaintiff to show what might cause the table to start automatically, and also of evidence offered to show that the fellow servant before the accident had said that there was a defect in the table, is immaterial.

RUGG, C. J. This is an action of tort at common law whereby the plaintiff seeks to recover damages for personal injuries received by him while in the employ of the defendant. He worked in a car barn, in which were several parallel tracks and a shifting table. This was a platform device, whose chief elements were two rails joined firmly together in such way that they could be superimposed upon the rails of an ordinary track. On account of the tapering ends of the rails of the shifting table a car could be run upon it readily by power communicated through its own trolley. The shifting table was supported upon small wheels designed to run upon tracks at right angles to the main tracks of the barn. A controller box was on the shifting table for its operation, and from this to an overhead wire at right angles to the trolley wires was a contrivance serving as a trolley pole. The purpose of the shifting table was to move trolley cars from track to track in the barn. There was evidence that the plaintiff had been asked first to assist in moving cars by means of the shifting table two or three days before his injury, and had assisted six or eight times. At the time of the accident he was asked to "swing around" the trolley of a car on the shifting table, and (to quote from the report of the judge) "in doing this he took the trolley rope box off the end of the car and walked around; when he pulled it around, the trolley was pretty stiff, and when he got around about opposite the centre of the car, the table started up all of a sudden and caught him; that he could not say whether Lee started the table or whether it started up of its own accord." The plaintiff was injured by this starting of the table. Lee was in charge of the controller at this time. There was no other evidence than this as to the cause of this starting of the table. The antecedent and contemporaneous circumstances leave the cause of the starting wholly in doubt. There was evidence that on other occasions Lee had started the table "pretty quick" and also "very slow and smooth" and that "when he (Lee) would go to start it up you would think when he put on the power it would almost explode it . . . almost inside it would blow to pieces, you could hear it buzzing out right inside." Upon all this evidence with rational inferences in its aspect most favorable to the plaintiff, the cause of the starting of the table at the time of the plaintiff's injury was as attributable to an agency for which the defendant was not responsible as to one for which

it was responsible. The action being at common law, and not under the employers' liability act, Lee was a fellow servant of the defendant, and for his negligence in starting the table carelessly or without warning, the defendant cannot be held liable. *Zeigler v. Day*, 123 Mass. 152. *Connors v. Holden*, 152 Mass. 598. *Bjbjian v. Woonsocket Rubber Co.* 164 Mass. 214. *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209. *McGee v. Boston Cordage Co.* 139 Mass. 445. *Greibenstein v. Stone & Webster Engineering Co.* 205 Mass. 431, and cases cited at p. 437.

The plaintiff seeks to bring his case within the rule that the unexplained automatic starting of a machine when it should remain at rest is evidence of negligence of the person having the general care and control of the machine, and relies upon *Ryan v. Fall River Iron Works*, 200 Mass. 188, and *Chiuccariello v. Campbell*, 210 Mass. 532. But that principle has no application to the facts of the case at bar, because it is conjectural whether the machine started automatically or by reason of the act of Lee. For this reason also the evidence of the expert as to what might cause the shifting table to start automatically was excluded rightly.

The plaintiff was not required to point out the precise cause of his injury. But he did not introduce evidence enough to remove it from the realm of pure speculation or to make it any more likely that he was hurt by a cause for which the defendant was liable than by one for which no liability attached to it. Hence the direction of a verdict for the defendant * was necessary. *Childs v. American Express Co.* 197 Mass. 337. *Bigwood v. Boston & Northern Street Railway*, 209 Mass. 345, and cases cited at p. 349. *MacDonald v. Edison Electrical Illuminating Co.* 208 Mass. 199. *Lydon v. Edison Electrical Illuminating Co.* 209 Mass. 529. *Carney v. Boston Elevated Railway*, 212 Mass. 179.

In this view of the case, evidence that Lee had said that the motor of the shifting table was out of order was immaterial.

Judgment on the verdict.

W. B. Grant, (P. Mansfield with him,) for the plaintiff.

R. A. Stewart, (R. B. Hull with him,) for the defendant.

* The case was tried before *Brown, J.*, who at the close of the plaintiff's evidence ordered a verdict for the defendant and reported the case for determination by this court.

JAMES A. ROCHFORD vs. MARTHA M. ATKINS & others.

Suffolk. November 20, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bond, Execution. Evidence, Presumptions and burden of proof.

At the trial of an action against a married woman upon a bond to dissolve a mechanic's lien, it appeared that the original of the bond was lost, and the defendant testified that she had no memory of signing the bond, that she would rather say that she did not sign it than that she did, that that would be truer, that at about the date of the execution of the bond she was ill, that, if her signature was obtained, it was obtained by force or coercion practised upon her by her husband, and that her relations with him at that time were strained. There was evidence tending to show that she had an interest in the premises upon which the lien was claimed, that she had been in court at different times in connection with the suit to establish the lien, that her attorney had prepared the bond and had given it to her husband, who took it away with him, and that the other signers of the bond were the husband and one to whom the defendant had conveyed the property by a foreclosure deed before the filing of the bond. *Held*, that the question, whether the defendant executed the bond, was for the jury.

SHELDON, J. This is an action upon a bond given to dissolve a mechanic's lien under R. L. c. 197, § 28. The plaintiff is entitled to hold Mrs. Atkins if the bond was executed by her; and the case comes before us, after a verdict for that defendant,* upon the plaintiff's exception to a ruling made at the trial that there was no evidence that she had executed the bond.

The original bond had been lost and could not be produced at the trial. The defendant testified that she had no memory of ever signing the bond, that she would rather say that she did not sign it than that she did, that this would be truer, that she had no recollection of doing such a thing. She also testified that at about the date of the execution of the bond she was ill, and that, if her signature was obtained, it was obtained by force or coercion practised upon her by her husband, that her relations with him then were very much strained. There was evidence that she had an interest in the premises on which the lien was claimed, and that she was in court at different times in connection with the suit to establish the lien. A lawyer testified that he had been attorney

* The case was tried before *Brown, J.*, who ordered a verdict for the defendant Martha M. Atkins.

for her in that suit, and had prepared a bond to be given to dissolve the lien. Being shown a certified copy of the bond sued on, he testified that he drew the bond of which that was a copy, and put it into the hands of her husband, who took it away with him. The other signers of the bond purported to be her husband and a Mrs. Clark, to whom before the filing of the bond the defendant had conveyed the property by a foreclosure deed.

The question is very close, but with some hesitation we are of opinion that it should have been submitted to the jury. The defendant had an interest to give the bond and dissolve the lien which was claimed. It does not appear that any one else except Mrs. Clark, her grantee, had such an interest. She knew of the plaintiff's claim of a lien, employed counsel, and appeared personally in court to contest it. The bond was drawn by her attorney, and it is not an unreasonable inference that he acted at her request. She went no further in denying her execution of it than to say that she did not remember having done so. But she testified without qualification that, if she did sign it, her signature was obtained by the force or coercion of her husband. She did not intimate that he had forced her to sign any other papers or to perform any other act. It might with plausibility be argued that she meant to say that, if she had signed this bond, then she remembered distinctly that her husband had forced her to do so. But this might be regarded as an indirect admission of her signature; for plainly she could not remember that she had done it under duress if she could not remember that she had done it at all. Of course the weight of this argument would have been much lessened if there had been anything to show that her husband had forced her to sign any paper which might have been this bond, or even that he had some interest in obtaining the dissolution of the lien. But there was no such evidence.

If she executed the bond under duress of her husband without any fault or privity of the plaintiff, this would not necessarily afford a defense to the present action. *Fairbanks v. Snow*, 145 Mass. 153. *Phillips v. Chase*, 203 Mass. 556, 565.

Exceptions sustained.

W. Hirsh, for the plaintiff.

E. F. McClennen & C. S. Hill, (*R. G. Kilduff* with them,) for the defendant Martha M. Atkins.

ERRICO D'ADDIO vs. HINCKLEY RENDERING COMPANY.

Suffolk. November 20, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Agency, Existence of relation, Scope of employment. Evidence, Presumptions and burden of proof. Practice, Civil, Interrogatories.

At the trial of an action against a corporation for personal injuries alleged to have been caused by the plaintiff being run over by a team driven by a servant of the defendant, the only evidence offered by the plaintiff to show that the driver of the team was a servant of the defendant acting within the scope of his employment was some oral testimony and answers of the defendant's treasurer to interrogatories propounded to him by the plaintiff. The oral testimony tended to show that the defendant's name was on the wagon, that the accident happened during the usual working hours of the day, and that the team previously had been on the street where the accident happened. The treasurer in answer to an interrogatory, whether a wagon controlled by the defendant caused injuries to the plaintiff at the time and place in question, stated, "I do not believe that the plaintiff received any substantial injuries, and from the best information I can get, if the plaintiff ever did receive any injury, it was due to his own fault, or to that of his legal custodian." In answer to interrogatories asking in substance whether a report concerning the accident was made to the defendant by him or by any other official of the corporation and for a copy of the report, the treasurer answered merely, that, upon receiving a letter from the plaintiff's attorney "claiming that the plaintiff had been injured," an investigation and a report had been made, and that he "as treasurer" made no report. Replying to an interrogatory asking whether the person driving the team in question was in the employ of the defendant, the treasurer answered that "a man in the general employment of the defendant was driving a team" at the time and place of the accident. In reply to an interrogatory as to the duties of such driver, the treasurer answered, describing his duties, and stating that "the purpose of his being" at the place in question at the time of the accident "was in no way concerned with" the duties so described. *Held*, that the oral testimony, taken in connection with the substance and character of the answers to the interrogatories, warranted a finding that the driver of a team was a servant of the defendant and was acting within the scope of his employment.

When it is within the power of a party to an action to explain things apparently telling against him and he fails to make the explanation, the inference properly may be drawn that no truthful explanation will help him.

TORT, for personal injuries alleged to have been caused by the plaintiff, a boy twenty months old, being run over on Prince Street in Boston by a wagon owned by the defendant and in which an employee of the defendant was driving. Writ in the Municipal Court of the City of Boston dated October 20, 1910.

On appeal to the Superior Court the case was tried before *Lawton, J.* The material facts are stated in the opinion. At the close of the plaintiff's evidence, the defendant rested, and the judge ordered a verdict for the defendant and reported the case to this court for determination, the parties stipulating that, if upon the evidence the plaintiff was entitled to recover, judgment should be entered in his favor in the sum of \$240, and that otherwise judgment should be entered for the defendant.

The case was submitted on briefs.

G. P. Beckford, for the plaintiff.

E. C. Stone, for the defendant.

HAMMOND, J. The only question argued before us by either counsel is whether the evidence would have warranted a finding that the team which is alleged to have caused the injuries to the plaintiff was at the time of the accident owned by the defendant and driven by its servant acting within the scope of his employment.*

The evidence upon this question consisted in part of the oral testimony of witnesses called by the plaintiff and in part of the written answers of the defendant's treasurer to interrogatories to him, filed by the plaintiff. The only oral evidence as to the wagon was that it was "a soap grease team" and had upon it the name "Hinckley Rendering Company" (which is the defendant's corporate name), and the number "26." The only oral evidence as to the driver was that he was known to one of the plaintiff's witnesses, she "having known him a number of years when he used to collect soap grease." If the evidence had stopped there, it might have been said that the plaintiff had not shown enough to entitle him to go to the jury. But the evidence did not stop there. The answers of the treasurer were singular, and are significant upon the question. The interrogatories directly pertinent to this inquiry and the answers thereto are the following:

"Int. 10 — On September 23, 1910, did a horse and wagon operated or controlled by the Hinckley Rendering Company cause injuries to the plaintiff on Prince Street, Boston?

* The report stated as follows: "There was evidence offered by the plaintiff of his having received injuries by being run over by a wagon. There was evidence for the jury on the questions of the plaintiff's due care and the defendant's negligence."

"Ans. . . . I do not believe that the plaintiff received any substantial injuries, and from the best information I can get, if the plaintiff ever did receive any injury, it was due to his own fault, or to that of his legal custodian.

"Int. 11 — Was a report made to the Hinckley Rendering Company or any of its officials or agents, or servants, on September 23, 1910, or any time subsequent thereto concerning an accident or injuries to the plaintiff in this case, which occurred on September 23, 1910, on Prince Street in Boston?

"Ans. . . . Upon the receipt of a letter from the plaintiff's attorney claiming that the plaintiff had been injured, an investigation and a report were made, such letter being the first notice the defendant had of any alleged injury to the plaintiff.

"Int. 12 — Did you as treasurer or as an official or employee of the defendant corporation, or did any one as official, agent, employee or servant of the defendant company, make a report of the accident which occurred on Prince Street, Boston, on September 23, 1910?

"Ans. . . . As treasurer I made no report to the Company.

"Int. 13 — If your answer to the preceding interrogatory is yes, attach a copy of such report to your answer to this interrogatory.

"Ans. . . . See answer to interrogatory No. 11.

"Int. 14 — Was the person driving the team which caused the injuries to the plaintiff in this action on September 23, 1910, on Prince Street, in Boston, in the employ of the defendant?

"Ans. . . . A man in the general employment of the defendant was driving a team on Prince Street, Boston, at some time on September 23, 1910.

"Int. 18 — What were the duties of the driver of the team which caused injuries to the plaintiff on September 23, 1910, on Prince Street, in Boston?

"Ans. . . . The duties of the man referred to in my answer to interrogatory No. 14 were to collect market waste, but said man collected no market waste in Prince Street, Boston, on September 23, 1910, and the purpose of his being on said Prince Street was in no way concerned with the collecting of market waste."

It is thus seen that when asked (Int. 10) whether the team which caused the injuries to the plaintiff was operated or controlled by

the defendant the defendant's treasurer does not directly answer, but says in substance, from "the best information he can get," there were no substantial injuries and that at any rate the plaintiff, or his custodian, was at fault. The answer is almost in the nature of confession and avoidance. It indicates that he has been investigating the question of the liability of the defendant and has come to the conclusion that the best ground of defense is, not that the defendant is not answerable as the owner of the team, but that the plaintiff was not injured or, if he was injured, it was the fault of his custodian.

Again, when asked whether any report of the accident has been made by him or any one as official agent or servant of the defendant, and when requested to attach such report to his answer (Ints. 11, 12, 13), he says that upon receipt of a letter from the plaintiff's attorney, that being the first notice the defendant had of the plaintiff's injury, an investigation and a report were made; and that he "as treasurer" made no report to the defendant. It also appears (see answers to Ints. 14 and 18) that a man in the general employment of the defendant and whose duty was to "collect market waste" was at some time during the day of the accident on the street where it occurred.

And this is not all. We are not dealing with a case where at the close of the plaintiff's testimony the presiding judge rules that there is no case for the plaintiff, or in other words that the defendant is not called upon to put in his evidence. In such a case there are no presumptions to be drawn against the defendant for his failure to explain whatever may be against him. The presiding judge in substance rules that there is no need of explanation on his part, and that is enough. In the present case the ruling was made at the close of the whole evidence. Possibly the judge, as is frequently the case, declined to rule until the defendant rested. At any rate the defendant did then rest. If there was anything in the evidence produced by the plaintiff which bore against the defendant, it was called upon to explain and it had the fullest opportunity to do so. Nor is this a case where the person who presumably would be the best witness on the subject, namely, the driver of the team, could have been called by the plaintiff as well as by the defendant. The plaintiff did not know his name. The plaintiff had interrogated the defendant as to his name and the

defendant had declined to give it. Under these circumstances the rule applies that when it is in the power of a party to an action to explain things apparently telling against him and he fails to make the explanation, it properly may be presumed that no truthful explanation will help him.

It is to be further noted that the driver of the team had been at the time of the accident in the employ of the defendant six months; and it is fairly to be inferred from the record that the accident occurred during the usual working hours of the day. It is true that in his answer to the eighteenth interrogatory the treasurer, after stating that the duties of the driver of the team were to collect market waste, added that the man collected no market waste on that street that day, and that his purpose in being on that street was "in no way concerned with the collecting of market waste." But it is to be observed that the treasurer does not say for what purpose the team was then and there on the street, or that the driver was not then acting upon some specific errand; nor does he state the circumstances so that the court may see whether the witness is right in his conclusion that the driver's errand had no connection with the collecting of market waste. It is unnecessary to go into the evidence more in detail.

In view of the name upon the wagon, the time of the accident, occurring as it did in the usual working hours of outdoor daily labor, the oral testimony as to the acts of the driver when on the street, and that the wagon had been on this street before and was a "soap grease team," the answer made by the defendant's treasurer and the inferences legitimately to be drawn from their evasive nature, — all taken and interpreted in connection with and in the light of the defendant's failure to explain when the opportunity was presented, — we think that the evidence would have warranted a conclusion on the part of the jury that at the time of the accident the driver of the team was a servant of the defendant and was acting within the scope of his employment.

In accordance with the terms of the report there must be judgment for the plaintiff in the sum of \$240, and it is

So ordered.

ABRAHAM I. RUDNICK & another vs. JAMES R. MURPHY & others.

Suffolk. November 21, 22, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Certiorari. Building Laws. Boston.

The granting of a writ of certiorari is always a matter of judicial discretion and the writ never is granted when it would operate inequitably or unjustly.

The owner of a lot of land in Boston, who has built upon it a tenement house that extends over his whole lot without leaving an open yard behind it as required by St. 1907, c. 550, § 55, cannot maintain a petition for a writ of certiorari for the purpose of enforcing against the owner of the lot adjoining the rear of his lot the requirement of § 55 which he himself has violated.

PETITION, filed on May 7, 1912, by the owner and the mortgagee of a five-story stone apartment or tenement house on Hemmeway Street in Boston, for a writ of certiorari addressed to the board of appeal of the building department of the city of Boston, created by St. 1907, c. 550, to quash the proceedings and decision of that board under § 8 of that statute granting an application of the trustees of the Fenway Trust, so called, for a permit for the erection of an apartment or tenement house at 60 Fenway on a lot of land adjoining the rear of the petitioners' lot in a manner purporting to be equivalent to that required by § 55 of the statute, which provides that back of such a tenement house there shall be a yard of the depth there designated extending across the entire width of the lot.

The case was heard by *Hammond, J.*, who reserved and reported it for determination by the full court. The facts material to the decision are stated in the opinion.

J. E. Macy, for the petitioners.

J. P. Lyons, for the city of Boston.

G. A. Sweetser, for the respondents Partridge and Russell.

SHELDON, J. Some very interesting and important questions are raised in this case, which we do not find it necessary to consider; for, if all other matters were decided in favor of the petitioners, we are yet of opinion that the writ of certiorari ought not to be issued for their relief.

The petitioners seek to compel the owners of the adjoining lot to build in a manner exactly opposite to that which they have themselves adopted. They would require these adjoining owners to leave in the rear of their lot a vacant space or yard of the width required by St. 1907, c. 550, § 55, although the petitioners themselves, in violation of the same statute, have left no vacant space or open yard whatever upon the rear of their own land abutting upon the rear of the land of these adjoining owners. The petitioners have no property right in the obedience of their neighbors to the statutory requirements (*Hagerty v. McGovern*, 187 Mass. 479), although we assume that the value of their property may be so affected as to entitle them to prosecute this petition under the provisions of § 129 of the statute already referred to. But however much the value of their property may be affected by the fact that a strip of only three feet wide of their neighbors' land is to be left open for their advantage, it is plain that the damage to those neighbors from the petitioners' act in leaving no open space at all upon their own abutting land must be proportionally much greater. After causing this loss to their neighbors, the petitioners are not in a position to invoke the exercise of a discretionary remedy to prevent less injurious action of the same kind on the part of their neighbors. It is further to be borne in mind that the loss of value to the petitioners' estate must be largely a loss of the increment of value which they had wrongfully obtained by occupying the whole of their own lot to the detriment of their neighbors' property.

Evidently, if under this state of facts the petitioners' remedy had been in equity, and if they were now seeking by equitable process to compel their neighbors to leave open the full space which it is claimed should be left open upon their neighbors' land, the petitioners would fail, both for the reason that they who seek equity must do equity, and because it could not be said that they came into court with clean hands, or, as an old maxim puts it, "he that hath committed iniquity shall not have equity." *Railroad Co. v. Soutter*, 13 Wall. 517, 523, 524. *Johnson v. Moore*, 33 Kans. 90, 99. *Goble v. O'Connor*, 43 Neb. 49, 58. Their misconduct was in regard to the very matter now in litigation, the leaving of an open and unoccupied space between the buildings upon these two adjacent lots of land; it has affected the relations of the parties and

of their respective properties to each other, and would result, if the petitioners' claim were maintained, in securing to them an unjust and inequitable advantage at the expense of their neighbors. This comes exactly within the restrictions of the rule stated in *Langdon v. Templeton*, 66 Vt. 173, 182, and in *Hays' estate*, 159 Penn. St. 381. The principle is declared in our own decisions. *Lawton v. Estes*, 167 Mass. 181. *Snow v. Blount*, 182 Mass. 489. *Downey v. Charles S. Gove Co.* 201 Mass. 251. *Wilson v. Jackson*, 204 Mass. 432, 436. And see the cases collected in 11 Am. & Eng. Encyc. of Law, (2d ed.) 162 *et seq.*, and 16 Cyc. 144 *et seq.* It is true that we have here not a suit in equity, but a suit at law; *Brockton v. County Commissioners*, 183 Mass. 42; but it is also true that the granting of a writ of certiorari is always a matter of judicial discretion, and never is allowed when it would operate inequitably and unjustly. *Rutland v. County Commissioners*, 20 Pick. 71, 78. *Hancock v. Boston*, 1 Met. 122, 123. *Stone v. Boston*, 2 Met. 220, 228. *Noyes v. Springfield*, 116 Mass. 87. *Ward v. Newton*, 181 Mass. 432, 433.

It does not matter that the petitioners may have acted in good faith in the erection of their building. That was true of the defendant's violation of another building law in *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.* 195 Mass. 356. They must obey the law at their peril. Nor is it material that the value of their land might have been in some slight degree affected by the construction of the adjoining building as contemplated, even if they had themselves complied with the requirements of the statute. They would then have had a standing to make their complaint in court.

The pendency of the bill in equity against the petitioners can be of no consequence. If that bill can be maintained, and if the petitioners' contention as to the merits of the case is sound, and we make no intimation as to either question, it is difficult to see why the remedy in equity is not as available to one neighbor as to another. But if there is any other adequate remedy, the writ of certiorari should not be issued.

Petition dismissed.

KATHERINE BUCHANAN, administratrix, vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 22, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Railroad.

In an action by the administrator of the estate of a rear end brakeman of a passenger train against the railroad corporation by which he was employed, for causing his death in a collision, it appeared that the train on which the intestate was such brakeman arrived late at a station, that another train on the same track was due at the station, and that under the defendant's rules it was the duty of the intestate to go back with danger signals to stop the following train in time to prevent a collision, that the intestate wholly failed to perform this duty, that the engineer of the following train neglected to observe the warning of the block signals, and that the collision occurred. *Held*, that the plaintiff could not recover, because the intestate's failure of duty contributed to the happening of the accident, and the fact that the negligence of the engineer cooperated to cause the accident did not excuse the negligence of the intestate or change its effect.

TORT, by the administratrix of the estate of Malcolm W. Buchanan, for causing the death and conscious suffering of the plaintiff's intestate in a collision of trains on November 28, 1908, when he was employed as a rear end brakeman on a passenger train of the defendant, the declaration containing three counts, the first two counts under R. L. c. 106, § 72, and acts in amendment thereof, alleging that the injuries of the intestate resulting in his death were caused by the negligence of a person in the employ of the defendant who was in charge or control of a signal, switch, locomotive engine or train upon a railroad, and the third count under St. 1907, c. 392, alleging that such injuries and death were caused by the negligence of the defendant, or by the negligence or unfitness of its agents or servants engaged in its business. Writ dated March 9, 1909.

In the Superior Court the case was tried before *Brown, J.*, who at the close of the plaintiff's evidence, which is described in the opinion, ruled that the plaintiff was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged excep-

tions, containing a stipulation that, if the ruling and direction were right, judgment was to be entered for the defendant; and that, if the ruling and direction were wrong, judgment was to be entered for the plaintiff in the sum of \$3,000.

J. W. McConnell, for the plaintiff.

J. L. Hall, for the defendant.

SHELDON, J. When the train on which the plaintiff's intestate was the rear end brakeman or flagman stopped at the South Boston station, it was five or six minutes late. Another train was due to leave the Boston station four minutes after the intestate's train, coming upon the same track. Under the defendant's rules which were in evidence, applicable to this state of facts, it became the duty of the intestate, as soon as his train had stopped, to go back at once with fuses and torpedoes as danger signals, and take measures to stop the following train in season to avoid a collision. There is evidence that he did nothing of the kind, and there is no affirmative evidence that he did anything in compliance with these rules. He had been furnished with a book of rules and time tables, and there is no ground for a contention that he was not acquainted with them. *Foley v. Boston & Northern Street Railway*, 198 Mass. 532. The rules were established by the defendant in the discharge of the high degree of duty which it owed to its passengers; and their strict observance by its servants is often essential to the safety of travellers. A failure on the part of such servants to observe the requirements of these rules may not only cause the railroad company great pecuniary loss, but may cause one of those serious accidents which, with the loss of life and grievous bodily injury that they involve, rightly have been made the subject of severe condemnation. Such an unjustifiable violation of proper rules, either causing or contributing to cause death or bodily injury, is, as between the company and its delinquent servants, negligence on the part of the latter. *Wescott v. New York & New England Railroad*, 153 Mass. 460. *Jones v. New York, New Haven, & Hartford Railroad*, 184 Mass. 89. *Foley v. Boston & Northern Street Railway*, 198 Mass. 532.

We find in this case no justification or excuse for the intestate's failure to observe the rules. Whatever might have been said as to the previous stops of his train, and whether or not the state of affairs at those times might have raised a question as to his duty

to leave his post at the rear end of his train to guard against danger from following trains, the evidence discloses nothing to throw doubt upon his duty to comply with the rules at South Boston. These rules could not be held to apply merely to an occasion where the train was stopped by some accident or obstruction, as in *Northern Pacific Railroad v. Poirier*, 167 U. S. 48. The duty imposed by them was absolute, to be performed without waiting for the engineer's signal or the conductor's orders, not a matter of his own judgment or discretion; and such cases as *Lake Shore & Michigan Southern Railway v. Parker*, 131 Ill. 557, and *Texas & Pacific Railway v. Leighty*, 88 Texas, 604, have no bearing. These rules were well adapted, and must be taken to have been designed, for the avoidance of accidents and the safety of human life and limb, and are not like those spoken of in *Strong v. Iowa Central Railway*, 94 Iowa, 380, 387. We find no evidence tending to show that in practice the rules had been waived, abandoned or superseded within the principle stated in *Brady v. New York, New Haven, & Hartford Railroad*, 184 Mass. 225, 228. The intestate had notice, at least at tower 80, some little time before reaching the South Boston station, that his train was upon the track of the Midland Division, which was to be taken by the following train.

It is manifest that the intestate's failure of duty contributed to the happening of this accident. The engineer of the following train doubtless should have been warned by the block signal which he passed; but the intestate should have seen to it that besides that signal the engineer should have also the warnings which it was the intestate's duty to give. As in *Wescott v. New York & New England Railroad*, 153 Mass. 460, this accident apparently was due to the effect of the negligence of another servant of the railroad company coöperating with that of the intestate; but no more than in the Wescott case does that fact exonerate the intestate. The engineer of the following train disregarded one signal which he ought to have observed and obeyed. The safety of the passengers on both trains required the intestate to comply with established rules by giving to that engineer another and a more emphatic warning. He cannot be heard to say that his failure to give that warning did not contribute to cause the collision.

Some rulings on evidence were excepted to, but we do not deem

it necessary to discuss them in detail. None of them can be sustained. The duty of the intestate to go back at South Boston and give the required warnings was independent of any orders from the engineer or conductor. Good * had not been employed on the defendant's road since 1906, and did not claim to have any knowledge of what was done under its rules for two years before the accident.

The verdict for the defendant was rightly ordered, and under the terms of the report judgment must be entered thereon.

So ordered.

ALBERT KEEFE vs. DANIEL J. HART & another.

Suffolk. November 26, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Arrest. False Imprisonment. Officer. Police.

When a police officer has arrested a person without a warrant upon probable cause to believe that such person has committed a felony, it is his duty to bring the prisoner before a court or magistrate as soon as reasonably is possible, and he has no right to detain the prisoner for the purpose of making a further investigation of the charge against him.

Where an officer, after arresting a person without a warrant upon reasonable cause to believe that he had committed a felony, is satisfied that his suspicions were unfounded, he is not required to make a formal complaint under oath, but does his duty by bringing the prisoner before the proper magistrate and laying before that magistrate a full statement of the facts.

In an action against a police officer for alleged false imprisonment in detaining the plaintiff in custody for an unreasonable time without bringing him before a magistrate after having arrested him upon probable cause to believe that he had committed a felony, where the facts in regard to the circumstances of the detention are not agreed, it cannot be ruled as matter of law that a delay of an hour and a quarter was reasonable.

TORT, against two police officers of the city of Boston, for the alleged unlawful arrest and false imprisonment of the plaintiff on April 7, 1908. Writ in the Municipal Court of the City of Boston dated July 21, 1908.

On appeal to the Superior Court the case was tried before Fox, J.

* A witness called by the plaintiff.

The plaintiff testified that he had resided for a long time in Cambridge and for about twenty-five years had been engaged in the produce business in Boston, and that he at times made a business of buying and selling railroad tickets. He also testified in substance as follows: On April 7, 1908, the plaintiff had in his possession a certain railroad ticket which he took to the office of one Colpitts on Washington Street, Boston. After some conversation with him, Colpitts took the ticket to the office of the Grand Trunk Railway on Washington Street and in a little while returned saying that the manager of the Grand Trunk Railway wanted to see the plaintiff. The plaintiff then went to the office of the Grand Trunk Railway, saw the manager, one Boynton, and had some talk with him. The defendant Hart then came into the office, had some talk privately with Boynton, and then approached the plaintiff, told him that Boynton suspected that the railroad ticket in question was a stolen ticket, and asked the plaintiff where he got it. The plaintiff replied that he had bought the ticket that morning from a pawnbroker named Rudinsky on Merrimac Street, Boston. The plaintiff told the defendant that he did not know the street number of Rudinsky's place but described it as well as he could. The defendant Hart then asked the plaintiff to accompany him to Merrimac Street, and the plaintiff replied that he would do so if he was not under arrest but that he would not go with the defendant if under arrest, and said, "Let's settle this right now. Am I under arrest or not?" The defendant then said, "You are under arrest, come with me," and placed his hand upon the plaintiff's arm, led the plaintiff from the office, then along Washington Street to School Street, through School Street and into Court Square to Police Station No. 2. At the police station the plaintiff was led by the defendant Hart to the desk where the defendant O'Neil was sitting. At the direction of the defendant O'Neil, the plaintiff was searched, his money, keys, railroad ticket, etc., were taken from him, and his description was entered in a book by the defendant O'Neil, who also recorded in the book that the plaintiff was arrested on the charge of being a "suspicious person." The defendant O'Neil then ordered the defendant Hart to put the plaintiff in a cell, and the defendant Hart led the plaintiff to a cell, locked him in and left him. About an hour and a quarter later the defendant Hart came back again to the door of the cell,

opened it and said, "Come out, Keefe. You can go." The plaintiff asked, "Am I to be taken before the court?" and Hart replied, "No. Get to hell out of this." The plaintiff then went out of the cell, to the desk where his personal property, including the railroad ticket in question, was handed to him. The defendant Hart asked him to sign some book which he refused to do, and then the plaintiff went out of the police station. The plaintiff further testified that he was not taken before any court, nor, so far as he knew, was any complaint against him made to any court.

Boynton, called as a witness by the defendants, testified that he was manager for the Grand Trunk Railway, with an office on Washington Street, Boston. Colpitts called at his office on April 7, 1908, with a railroad ticket. The witness asked Colpitts to send the owner of the ticket in, and in a few minutes afterwards the plaintiff came. The witness also telephoned to the police, and the defendant Hart came. He told the defendant Hart that a railroad ticket office at Santa Monica had been broken into, that the ticket in the possession of the plaintiff was stamped Santa Monica and that he believed the ticket was one of the stolen tickets, but that he was not sure. The defendant Hart then approached the plaintiff and asked him where he got the ticket. The plaintiff told him that he purchased the ticket at a pawnbroker's somewhere on Merrimac Street. Hart then asked the plaintiff to go with him to Merrimac Street, and the plaintiff replied that he would not go unless he was under arrest. The defendant Hart then placed the plaintiff under arrest and took him out of the office. The witness Boynton further testified that later on the same day he wrote a letter to the head office of the Grand Trunk Railway, and that only when he received an answer to that letter several days later did he know whether or not the ticket was a stolen one.

The defendant Hart, a police officer for the city of Boston, testified that on the day in question he was called to the office of the Grand Trunk Railway, and there saw Boynton and the plaintiff. Boynton showed him a circular, and told him that he had received notice that the ticket office at Santa Monica had been broken into, entered, and a large number of tickets and the stamp had been stolen. The ticket in question bore the stamp "Santa Monica," and Boynton further told him the ticket was a stolen

ticket. He then asked the plaintiff where he got the ticket, and the plaintiff said that he got it in a pawnshop on Merrimac Street, that he did not know the name of the man who sold it to him, and that he had bought tickets of the man before. He then asked the plaintiff to accompany him there to find out about it, and the plaintiff said he would not go unless under arrest. The defendant Hart then placed the plaintiff under arrest, and told him that he was charged with having stolen property in his possession, knowing it to have been stolen, and walked with him to the station house where the defendant O'Neil, a sergeant of police in the police department for the city of Boston, was the officer in charge. Hart testified that Boynton accompanied them to the station, that he told the defendant O'Neil that the plaintiff was under arrest on suspicion of having stolen property in his possession, that he explained to the defendant O'Neil about the ticket. He told the defendant O'Neil that a ticket office at Santa Monica had been broken into and tickets stolen from it, that the plaintiff said he had bought the ticket on Merrimac Street. O'Neil then said, "Why don't you take him down to Merrimac Street and find out about it?" Hart replied, "He has had a chance to do that, and refused." O'Neil then booked the plaintiff as a "suspicious person" and ordered that he be searched and locked in a cell. The defendant Hart then went alone to Merrimac Street to investigate Keefe's story, having some doubt as to its truth. He visited the pawnshop of Rudinsky on Merrimac Street. As a result of his investigation, being convinced of Keefe's innocence, he returned to the station house, and, after talking to the officer in charge at the time, told the plaintiff that he had investigated and found that the plaintiff "came into possession of the ticket all right," and released him from custody. He further testified that he did not tell the plaintiff at that time to "get to hell out of here."

The defendant O'Neil testified that he was at the time of the trial a lieutenant in the police department for the city of Boston, and at the time in question was a sergeant of police in that department in charge of the station house to which the plaintiff was brought. He testified that Hart said of the plaintiff when he brought the plaintiff to the station, "Here is a man that was down at the railway office on Washington Street, and he has a stolen

ticket in his possession." Boynton then came up and showed him a circular giving the numbers of a large number of tickets that he said had been stolen, and that the ticket the plaintiff had was one of the tickets. The defendant O'Neil then inquired of the plaintiff where he got the ticket, and the plaintiff said, "On Merrimac Street." The defendant O'Neil asked him from whom he got the ticket, and the plaintiff replied that he did not know. O'Neil then asked him what number Merrimac Street, and the plaintiff said he did not know. O'Neil then said to the plaintiff, "Why don't you go down with the officer and find out and verify your statements?" Hart then said, "I have asked him to go down there, and he refused, and I placed him under arrest." O'Neil then asked the plaintiff his name, age and residence, entered them in a book, and assigned the plaintiff to a cell. The defendant Hart took him to the cell. In his entry in the records the defendant O'Neil stated that the offense for which the plaintiff Keefe was held was "suspicious person." At that time O'Neil's mind was not made up on the question of the plaintiff's guilt and he ordered Hart to make an investigation. He further testified that where a person had been arrested on suspicion of having committed some offense he would book such a case as "suspicious person." The defendant O'Neil was not present and was not in charge of the station when the plaintiff was released. It nowhere appeared that any complaint in court was made against the plaintiff by either of the defendants, and it appeared that the plaintiff was released from the station house without being brought before any court.

The foregoing was all the evidence in the case material to the questions raised by the bill of exceptions.

At the request of the plaintiff the judge instructed the jury that, if the defendants arrested the plaintiff, the burden of proof was upon them to justify the arrest; that, if the defendants arrested the plaintiff upon suspicion, the burden of proof was upon the defendants to show that they had reasonable and probable cause to believe that the plaintiff had committed a felony; and that the defendants were not justified in arresting the plaintiff, if they merely had some suspicion that he might have committed a crime, and took him in custody until they could complete their investigation.

The plaintiff also asked the judge to make the following rulings:

"4. The duty of the defendants after arresting the plaintiff was to take him without unreasonable delay before some court of competent jurisdiction for examination. Failure so to do makes the defendants liable to the plaintiff in this action.

"5. The defendants as arresting officers had no right to delay taking their prisoner before the court, while they make an investigation of the truth of the plaintiff's statements.

"6. The defendants after arresting the plaintiff had no right to discharge him from arrest without having taken him before the court. Having done so, they are liable in this action for false imprisonment."

The judge refused to make any of the rulings above quoted and instead instructed the jury in substance as follows: "A criminal proceeding can only be begun by a complaint under oath. If an officer who arrests a person on suspicion, having probable cause to believe that he has committed a felony, satisfies himself by investigation that the prisoner is innocent, he is not obliged to go to court and swear out a false complaint. Therefore, an officer who arrests a person on suspicion having reasonable cause to believe him to have committed a felony is not liable for false imprisonment if he releases the prisoner without taking him before a court or beginning any criminal proceedings against him."

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions to the refusals to rule and to the rulings above stated.

The case was submitted on briefs.

A. M. Pinkham, for the plaintiff.

P. E. Coyle & L. A. Rogers, for the defendants.

SHELDON, J. The defendants as policemen had the right to arrest the plaintiff without a warrant if they had reasonable grounds to suspect that he was guilty of a felony (*Commonwealth v. Phelps*, 209 Mass. 396, 404); and we now must take it that this issue has been settled in their favor by the verdict of the jury. But, having so arrested him, it was their duty to take him before a magistrate, who could determine whether or not there was ground to hold him. It was not for the arresting officers to settle that question. *Stetson v. Packer*, 7 Cush. 562. *Brock v. Stimson*, 108 Mass. 520. *Phillips v. Fadden*, 125 Mass. 198. *Clark v. Tilton*, 74 N. H. 330. *Douglass v. Barber*, 18 R. I. 459. *Pratt v. Hill*, 16 Barb. 303.

Green v. Kennedy, 46 Barb. 16. *State v. Parker*, 75 N. C. 249. *Manning v. Mitchell*, 73 Ga. 660, 663. *Judson v. Reardon*, 16 Minn. 431. *Newby v. Gunn*, 74 Texas, 455, 456. *Samuel v. Payne*, 1 Doug. 359. *Wright v. Court*, 4 B. & C. 596. As to this, the doctrine of *M'Cloughan v. Clayton*, Holt, N. P. 478, though approved in *Burke v. Bell*, 36 Maine, 317, has not been followed.

It is true that, if one so arrested consents to his release without being taken before a magistrate, if he chooses to waive this requirement of the law and to discharge his claim against the officer, he cannot afterwards complain of the omission. *Joyce v. Parkhurst*, 150 Mass. 243. *Caffrey v. Drugan*, 144 Mass. 294. *Bates v. Reynolds*, 195 Mass. 549. *Horgan v. Boston Elevated Railway*, 208 Mass. 287. But this is the personal option of the prisoner. The arresting officer is in no sense his guardian (*Phillips v. Fadden*, 125 Mass. 198, 201), and can justify the arrest only by bringing the prisoner before the proper court, that either the prisoner may be liberated or that further proceedings may be instituted against him. *Bath v. Metcalf*, 145 Mass. 274, 276.

The officer is not required to make a formal complaint under oath if he has concluded that his suspicions were unfounded. He does his duty by bringing his prisoner before the proper magistrate and laying before that magistrate a full statement of the facts. He is not responsible for the action of the magistrate. *Hobbs v. Hill*, 157 Mass. 556. *Douglass v. Barber*, 18 R. I. 459.

The defendants had no right to detain the plaintiff to enable them to make a further investigation of the charge against him. It was their duty to bring him before the court as soon as reasonably could be done. *Tubbs v. Tukey*, 3 Cush. 438, 440.

It cannot be said as matter of law that their delay for an hour and a quarter was reasonable. The facts as to this are not agreed. This interval may have overreached the time for the adjournment of the court to which the plaintiff should have been taken, and involved a yet longer delay. It is only when the facts are agreed that this issue becomes a question of law, as stated in *Loring v. Boston*, 7 Met. 409, 413, and *Gilmore v. Wilbur*, 12 Pick. 120, cited by the defendants.

The jury should have been instructed substantially as requested by the plaintiff, and the ruling given was erroneous.

Exceptions sustained.

ANDREW W. PRESTON vs. CITY OF NEWTON.

Middlesex. December 2, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Way, Public. Equity Jurisdiction, Remedy at law, To remove cloud from title.

Where land is taken by a city under statutory authority for the widening of a highway, and the owner of such land has filed and prosecuted a petition for damages for the taking, such owner by the prosecution of his petition admits that the proceedings for the taking of his land were legal and regular, and the remedy provided by the statute for compensation is exclusive.

A city taking land for the widening of a highway under statutory authority is not obliged to grade the way to the level of adjacent land or to construct approaches from such land. If the owner of such adjacent land is compelled to incur expense in order to provide access to the way from his land, such expense will be taken into account in assessing his damages for the taking.

A city which has taken land under statutory authority for the widening of a highway has no authority also to take an easement of slope in adjoining land for the purpose of grading it to connect with the way, as the statutes which authorize the laying out and widening of public ways do not authorize the taking of land for any purpose less than a way.

The owner of a strip of land, of which a city unlawfully has taken possession under an attempted taking for an unauthorized purpose, cannot maintain a suit in equity against the city to remove a cloud upon his title, because he is not in possession of the land and also because he has adequate remedies at law.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 13, 1912, by the owner of a strip of land on Washington Street in Newton, against that city, alleging a taking of the greater portion of such strip of land by the defendant for the widening of Washington Street and the further taking of an easement of slope in an additional portion of such strip, alleging also that the defendant never had made use of such easement of slope and had not graded such additional land to connect with the plaintiff's remaining land, so that the plaintiff was deprived of the reasonable use of such remaining land along the line of the taking; that the plaintiff had filed in the Superior Court a petition for an assessment of his damages; that the judge of the Superior Court had ruled that the alleged taking of the easement of slope was invalid and further had ruled that the defendant was not obliged to work the full taking so as to give the plaintiff access to the highway; that the jury

had disagreed and that no judgment had been entered. The plaintiff further alleged that it was the duty of the defendant to work the land and easement taken by it for highway purposes, so that, if the taking was valid, the plaintiff's damages might be shown and assessed by a jury; and also alleged that the land taken and not worked had been abandoned by the defendant; that the alleged easement of slope attempted to be taken was invalid and void, but that the defendant claimed title to the land and easement and thereby created a cloud upon the plaintiff's title which prevented his selling and giving a clear title to the land; and that the plaintiff was without remedy except in a court of equity. The prayers of the bill were that pending the hearing of the bill the proceedings on the plaintiff's petition in the Superior Court might be stayed; that the defendant might be ordered to record an abandonment or release of the portion of the strip of land included in the terms of the taking which it had neglected to work, or, if there had not been an abandonment of such unworked portion, that a mandatory injunction might issue ordering the defendant to remove the earth from such unworked portion so that the plaintiff might have access from his land to the highway at its level; that the attempted taking of the easement of slope might be decreed to be illegal and void, or, if the taking should be held to be valid, that a mandatory injunction might issue ordering the defendant to work such easement so that the plaintiff's damages might be apparent and be appraised by a jury; and for further relief.

The defendant demurred to the bill for want of equity and on the grounds that the plaintiff had an adequate remedy at law and an exclusive remedy at law.

The case was heard by *Loring, J.*, who made an interlocutory decree sustaining the demurrer. The plaintiff waived his right to amend his bill and appealed from the decree. After a further hearing the justice made a final decree sustaining the demurrer and ordering that the bill be dismissed with costs to the defendant. The plaintiff appealed.

The case was submitted on briefs.

H. J. Jaquith, for the plaintiff.

W. S. Slocum & P. F. Drew, for the defendant.

DE COURCY, J. This is a bill in equity relative to a taking of land by the city of Newton for the widening of Washington Street.

The order of the board of aldermen purported to take a strip of land about four hundred and eleven feet in length, nine feet in width at the northerly end and tapering to a point at the southerly end; and also an easement of slope in the adjoining land. As these two elements are separable and are governed by different legal principles, we shall first consider the strip of land taken and laid out for a street.

It is apparent from the description and plan duly filed in the registry of deeds after the passage of the order to take the land, that the taking was in accordance with the provisions of the statutes and of the charter of the city of Newton, and was valid. R. L. c. 48, § 97. St. 1897, c. 283, § 14, cl. 4. Indeed the plaintiff, by prosecuting his petition for the assessment of damages for the taking, necessarily has admitted that the proceedings by the city were legal and regular, and that his land has been appropriated by the municipality. *Pinkham v. Chelmsford*, 109 Mass. 225. *Murray v. Norfolk*, 149 Mass. 328. And it is well settled that where the Legislature authorizes the taking of land for a public use, and the taking is in accordance with the statute, and a plain and adequate remedy is provided for compensation, the remedy provided by statute is exclusive. *Lancy v. Boston*, 185 Mass. 219.

The plaintiff shows no legal cause of complaint in the fact that the city has not wrought the street. Roads are constructed for the safety and convenience of the public, and the city is not obliged to grade them up to the line of the adjacent lots, or to construct approaches therefrom. If, in order to provide access from his property to the road, the landowner is required to undergo expense, that will be taken into account in assessing the damages. *Metcalf v. Boston*, 158 Mass. 284. *Como v. Worcester*, 177 Mass. 543. *Hunt v. Mayor of Boston*, 186 Mass. 209. Apparently the allegation in the bill that the land taken and not worked has been abandoned is not now relied upon. As to this it is enough to say that a way once duly laid out continues to be such until discontinued according to law. *Loring v. Boston*, 12 Gray, 209. *Bliss v. Attleborough*, 200 Mass. 227.

The order of the board of aldermen, after the description of the parcel of land taken, contains the following: "An easement is also taken as shown on said plan in the land adjoining said street as widened, consisting of a right to have the land of the location of

said way protected by having the surface of such adjoining land slope from the boundary of the location of said Washington Street as widened." And the plan referred to indicates that the proposed "slope line of easement" is entirely outside the new line of the street. But in laying out the way the city had no right to take an easement in this land beyond the limits of the location. As stated by Knowlton, J., in *Doon v. Natick*, 171 Mass. 228, 230: "The statutes which authorize the laying out of highways and town ways do not recognize the necessity or desirability of taking different kinds of easements for the construction of ordinary ways, but they provide for the location of ways over lands of private owners. A location under these statutes subjects the land to an easement for any kind of use which may be reasonably necessary for the construction and maintenance of the way. The easement created by such a location is the only easement which county commissioners, road commissioners, or other tribunals laying out highways and town ways under general statutes, can create. They may take land for a way. They cannot take land for any purpose less than for a way, whatever may be the particular kind of use to which they intend to put it." The defendant urges that this portion of the order be construed as a legal taking of this land designed for a slope, thus giving the city the right to use it for the purposes for which any land may be used over which a highway is located. See *Simonds v. Walker*, 100 Mass. 112; *Doon v. Natick*, *ubi supra*. In the case at bar, however, it seems clear that the easement sought to be acquired by the taking was only that of having maintained as a slope the land of the plaintiff beyond the limits of the street as widened.

Nevertheless the plaintiff cannot in this action avail himself of this illegal attempt to subject his land to an easement of slope. The bill cannot be maintained to remove a cloud upon his title, as he is not in possession of the premises, which have been entered upon by the city. And further, no such bill lies when there is adequate relief at law. R. L. c. 182, § 1. *Russell v. Barstow*, 144 Mass. 130. *First Baptist Church of Sharon v. Harper*, 191 Mass. 196. He has a legal remedy in tort, *Mayo v. Springfield*, 136 Mass. 10; or by a writ of entry, *Harris v. Marblehead*, 10 Gray, 40.

The decree sustaining the demurrer must be affirmed; and the bill is to be dismissed but without prejudice to the right of the

plaintiff to invoke the common law remedy now open to him; and with costs to the defendant.

So ordered.

CHARLES A. TABER vs. CONTINENTAL INSURANCE COMPANY & others.

Suffolk. December 3, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Insurance, Fire. Words, "Whole amount insured."

Under the provision in the Massachusetts standard form of fire insurance policy, that, "If there shall be any other insurance on the property insured . . . the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon," in apportioning the amounts to be paid for damage by fire to a double building, the two parts of which were damaged unequally, between "blanket" policies for a certain amount on the whole of the building and a policy for a specific amount on each half of the building, where the insured will be indemnified whatever rule of apportionment is adopted, the general rule long established in this Commonwealth will be applied, that the proportion of the value of the property destroyed to be paid by each underwriter is that which the amount of the policy issued by it bears to the amount of all the insurance on the injured property, although some of the policies also cover other property, that is to say, that under the blanket policies the blanket amount is to be applied to the different items in proportion to their values.

BILL IN EQUITY, filed in the Superior Court on February 6, 1912, by the holder of a second mortgage on certain land on Eastern Avenue in Malden with a building thereon numbered 268 and 270, against three insurance companies, the owner of a first mortgage and the owner of the equity of redemption, to recover for damage to the insured building by a fire which occurred on November 14, 1911; praying that an accounting might be made of the amounts due upon each of the mortgages, and that the court should determine the amount which each of the insurance companies should pay and to whom such payments should be made and the amounts due to each.

The case was heard by *Hardy, J.*, who made a decree and reported the case for determination by this court. The material

facts thus reported are stated in the opinion. The decree made by the judge ordered, among other things, that the Continental Insurance Company and the Sun Insurance Office each should pay into a fund the sum of \$1,838.50 with interest from January 22, 1912, and \$10 as costs of suit, and that the Milwaukee Mechanics Insurance Company should pay into such fund the sum of \$1,438 with interest from January 22, 1912, and \$10 as costs of suit, all items of interest to be computed to the day of payment.

The report stated that the sole question reserved was whether or not the decree was based upon a proper theory of the respective obligations of the three defendant companies to contribute to the fund, in view of the fact that the damage was divided unequally between the two halves of the building. If based upon the proper theory, the decree was to be affirmed; otherwise, a decree was to be entered reversing the decree so far as it related to the sums to be contributed to the fund by such three defendants, and fixing the sums at their proper amounts, but affirming the decree in all other respects, including the date from which interest was to run on the sums to be contributed and the costs to be paid.

R. Homans, for the Continental Insurance Company and the Sun Insurance Office.

W. L. Came, for the Milwaukee Mechanics Insurance Company.

C. A. Taber, *pro se*.

DE COURCY, J. The only issue in controversy relates to the apportionment among the three insurance companies of certain amounts to be paid in settling the damages caused by fire to a dwelling house in Malden. No question is raised as to the division of the money among the parties in interest, the owner and mortgagees. The property insured was a double apartment building divided into two halves of equal value. The total damage by fire was \$5,115, of which \$3,640 was to the northeast half and \$1,475 to the southwest half.

The policies written by the three insurance companies were in the Massachusetts standard form, and each contained this provision: "If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon." The policies of the Continental and Sun Insurance Companies were for

\$2,500 each, and were what is commonly called blanket or compound policies, each covering the building as a whole. The policy of the Milwaukee company was for \$3,000, and was written "to attach an equal amount on each half;" in other words, it was a "specific" policy.

The Continental and Sun Insurance Companies urge that the "Vermont rule" so called should be followed in apportioning the loss between the compound and specific policies. By this rule the proportion of the value of the property destroyed to be paid by each underwriter is that which the amount of his policy bears to the amount of all the insurance thereon, although some of the policies cover other property in addition. In other words the blanket amount is applied to the different items covered by the policy in proportion to their values. This rule was adopted in this Commonwealth more than half a century ago, and more recently was applied in Vermont, and some other States. *Blake v. Exchange Mutual Ins. Co.* 12 Gray, 265. *Chandler v. Ins. Co. of North America*, 70 Vt. 562. And see *Ogden v. East River Ins. Co.* 50 N. Y. 388.

On the other hand the Milwaukee company contends for the application of what is known as the Connecticut rule, which regards the blanket policy as insuring each item to the entire amount of the policy unappropriated when the particular item is reached; that is, the whole blanket insurance is to be applied to one of the parcels covered by the specific policy and prorated therewith, the remainder to the next, and so on. *Schmaelzle v. London & Lancashire Fire Ins. Co.* 75 Conn. 397. *Grollimund v. Germania Fire Ins. Co.* 53 Vroom, 618.

The difficulty in fixing the amount to which the property covered by the specific is insured by the compound policy has led some courts to adopt still other rules of apportionment under the peculiar facts of particular cases. See *Cromie v. Kentucky & Louisville Mutual Ins. Co.* 15 B. Mon. 432; *Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Association*, 56 Tex. Civ. App. 588. Each method has been the subject of forceful criticism and either rule, if followed inflexibly, would result in injustice to the assured in some instances. The main requisite of any rule of apportionment is that the assured shall be afforded indemnity to the full extent of his rights under the policies of insurance; and, when a

case arises where the rule generally followed fails to accomplish that result, the question will be presented whether in the interest of justice the rule should be modified. If the question were a new one in this Commonwealth, we might well consider the relative merits of the different methods now followed. But, as we have said above, a rule was established here more than half a century ago; and undoubtedly adjustments generally have been made in accordance therewith. As a practical general rule it appears to have worked satisfactorily. There is no complaint in the present case that it fails properly to protect the insured. The objection urged against it, that it changes the contract between the parties, would apply with like force to the other methods suggested, and further does not seem to us to be tenable, because the question involved is really that of the construction to be placed upon the words "whole amount insured" in the *pro rata* provision of the policy.

The proper amounts to be paid by each company are those fixed in accordance with the rule adopted in *Blake v. Exchange Ins. Co.*, *supra*, which amounts we understand are not in dispute, namely, — on the \$3,640 item, the companies are to contribute as follows: the Sun Insurance Office, \$1,137.50; the Continental Insurance Company, \$1,137.50; and the Milwaukee Mechanics Insurance Company, \$1,365; and on the \$1,475 loss, the Sun Insurance Office is to pay \$460.94; the Continental Insurance Company, \$460.94; and the Milwaukee Mechanics Insurance Company, \$553.12.

In accordance with the terms of the report, the decree of the Superior Court is to be reversed so far as it relates to the shares to be contributed by the three defendants, and the foregoing figures are to be substituted. In other respects the decree is to be affirmed.

So ordered.

JENNIE I. RUSSELL vs. FRANKLIN A. WEBSTER & others.

Suffolk. December 4, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Gift. Trust. Agency.

One S, being the owner of certain shares of the capital stock of a corporation, caused such shares to be transferred to one who placed in his deposit box the new certificate for such shares together with the following memorandum signed by him: "The enclosed certificate . . . is the property of S, and is placed in my hands by him for safe keeping. I am to deliver the same to him at any time he may ask for it, and am to pay over to him all dividends which I may receive on the stock. In case of his death I am to transfer this certificate entire to R . . . and when this is accomplished my responsibility is ended." During S's lifetime the holder of the shares paid the dividends to him. On the death of S, both the executor of his will and R claimed the shares of stock. *Held*, that the holder of the shares was not a trustee, but was merely an agent for S, that the attempted gift to R to take effect after the death of S was void, and that the executor of the will of S was entitled to the shares.

DE COURCY, J. The plaintiff in this bill in equity prays that the defendant Webster be ordered to transfer to her a certificate of sixty shares of the capital stock of the defendant Boston Parcel Delivery Company. The defendant Fred A. Sawyer, as executor under the will of George A. Sawyer, deceased, in his cross bill seeks to have this certificate of stock assigned to him; and as the issue is really between him and the plaintiff, he is hereinafter called the "defendant."

On or before May 28, 1904, George A. Sawyer, owner of the stock in question, had it transferred on the books of the company to Franklin A. Webster and took out a new certificate in Webster's name. This certificate he gave to Webster with certain instructions which were embodied in the following memorandum assented to by Sawyer: "Boston, Mass., May 28, 1904. The enclosed certificate for sixty shares of the capital stock in the Boston Parcel Delivery Company, #136, is the property of George A. Sawyer of Boston, and is placed in my hands by him for safe keeping. I am to deliver the same to him at any time he may ask

for it, and am to pay over to him all dividends which I may receive on the stock. In case of his death I am to transfer this certificate entire to Jennie I. Russell, #337 Washington St., Dorchester, Mass., and when this is accomplished my responsibility is ended. Franklin A. Webster."

Thereupon Webster put the certificate of stock together with the memorandum in his deposit box, and has so held it ever since. Sawyer, until the time of his death on December 1, 1910, was paid the dividends on the stock by Webster, and made no request to have the certificate delivered to him.

Upon these facts the question arises whether a valid trust has been established in the plaintiff's favor, so as to entitle her to this stock, or whether the transaction was in intention and legal effect an attempted testamentary disposition of it. The language of the memorandum clearly indicates that Webster held the certificate as the property of Sawyer, and that his possession was only that of bailee or agent. It is true that the stock stood in the name of this agent, but he was obliged to deliver it to its owner at any time that owner might ask for it. The entire income was payable to Sawyer, even without demand, and he was as free to dispose of it as when the stock stood in his own name. During his life he retained the entire dominion and control of the stock, principal and income, as its general owner, and Webster was merely his depository, holding the property subject to his order. He intended that no title to or interest in the stock should pass to the plaintiff until after his death, but that it then should become hers in the event that he did not retake it from the possession of Webster. This was an attempt to make a testamentary disposition of the property, which under our statutes he could accomplish only by a duly executed will. *Howe v. Ripka*, 199 Mass. 359. *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50. *Stratton v. Athol Savings Bank*, 213 Mass. 46. The facts readily distinguish the case at bar from those wherein the owner manifested a present intention to divest himself of the entire control of the property by the creation of a valid trust, yet expressly reserved a power of revocation. *Stone v. Hackett*, 12 Gray, 227. *Bone v. Holmes*, 195 Mass. 495.

As the beneficial interest in and control of the shares of stock remained in George A. Sawyer so long as he lived and passed to his executor after his death, and as no trust therein was established

in favor of the plaintiff, a decree must be entered in favor of the executor, in accordance with the prayer in his cross bill.

So ordered.

L. G. Brooks, for the plaintiff.

H. A. Mintz, for the defendants.

MARTIN E. DRISCOLL vs. MAYOR OF SOMERVILLE.

Middlesex. December 6, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Constitutional Law, Separation of powers. Civil Service. Police, District and Municipal Courts.

St. 1911, c. 624, providing that, upon a petition by a person holding one of certain offices classified under the civil service rules, who after the hearing provided for by St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, has been removed therefrom, lowered in rank or compensation, suspended, or, without his consent, transferred from such office to any other, a police, district or municipal court shall review the action of the officers or board who so ordered and shall affirm it unless it shall appear that it was made without proper cause or in bad faith, in which case it shall be reversed and the petitioner shall be reinstated in his office, does not give executive powers to a court, and is constitutional.

RUGG, C. J. This is a petition for a writ of mandamus to compel the mayor of Somerville to reinstate the petitioner to the position of patrol driver in the police department of that city. The respondent removed the petitioner from his place after the preliminary proceedings required by law. The latter then petitioned the Police Court of Somerville in accordance with St. 1911, c. 624,*

* St. 1911, c. 624, § 1, reads as follows: "Every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, except members of the police department of the city of Boston, of the police department of the metropolitan park commission, and except members of the district police, whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may, after a public hearing, as provided for by section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, as amended by chapter two hundred and forty-three

for a review of this action of the mayor. That court found that the removal was made without proper cause, and reversed the order of removal and ordered the petitioner to be reinstated. The only contention made by the respondent is that St. 1911, c. 624, is unconstitutional because in contravention of that portion of art. 30 of the Declaration of Rights which prohibits the judicial department of government from exercising executive powers. The statute provides that the action of an officer or board in "removing, suspending, lowering or transferring" a person holding certain offices classified under the civil service law may be "reviewed" by a court whose decision "shall be final and conclusive upon the parties."

It is argued that because it has been said that the "power to appoint and the power to remove officers are in their nature executive powers," (*Murphy v. Webster*, 131 Mass. 482, 488,) it follows that no step in the removal of one from office can be vested by law in the courts. But such a conclusion is not sound. The civil service law has for one of its objects the establishment of a tenure for certain public officers and employees, which shall be secure from arbitrary removal by executive power. One means of accomplishing this end is to require executive officers to make certain removals only after preparing a specification of charges as grounds for removal and giving to the office holder or employee a public hearing upon those charges. Such a hearing, although held before an officer whose main functions are executive, is "in the nature of a judicial investigation." *McCarthy v. Emerson*, 202 Mass. 352, 354. It requires no argument to demonstrate that the question whether certain charges of misconduct or inefficiency have been substantiated by evidence is judicial in its essence. The same is true of the

of the acts of the year nineteen hundred and five, and within ten days after such hearing, bring a petition in the police, district or municipal court within the judicial district where such person resides, addressed to the justice of the court and praying that the action of the officer or board in removing, suspending, lowering or transferring him may be reviewed by the court, and after such notice to such officer or board as the court may think necessary, it shall review the action of said officer or board, and hear the witnesses, and shall affirm said order unless it shall appear that said order was made by said officer or board without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated in his office. The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties."

question whether a removal has been made without proper cause or in bad faith. A statute which requires a court to review the decision of questions like these, upon petition after notice to all parties and a hearing, according to judicial procedure, does not impose the performance of executive duties. It requires neither the removal nor the appointment of executive officers by the judicial department of government. It simply provides for a review of the decision of a question which is in its character judicial, by a court of law. There is nothing inconsistent with this view in *Boston v. Chelsea*, 212 Mass. 127.

We have discussed on its merits the point raised by the respondent. It is concluded, however, against his contention by *Barnes v. Mayor of Chicopee*, ante, 1. In accordance with the terms of the report, the interlocutory order denying the motion to dismiss the petition is affirmed and the case is to stand for trial on its merits.

So ordered.

The case was submitted on briefs.

W. A. Buie & W. J. Shanahan, for the petitioner.

F. W. Kaan, for the respondent.

RICHARD W. KENNEDY vs. WILLIAM F. POOLE, administrator,
& others.

Suffolk. December 6, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, To reform deed, Mistake. *Evidence*, Presumptions and burden of proof. *Frauds, Statute of*.

A suit in equity in which the plaintiff sought a reformation of a mortgage deed of real estate which, he alleged, by a mutual mistake of his mother and himself she had given to him instead of a deed conveying a title in fee simple, was referred to a master, who made findings of fact favorable to the plaintiff and included in his report a transcript of the evidence heard by him. Exceptions to the master's report were overruled and a decree was made for the plaintiff, from which the defendants appealed, contending that the master's findings were

not warranted by the evidence. It being manifest that the master's findings were warranted by the evidence, the decree was affirmed with costs. The statute of frauds has no application to a suit in equity seeking the reformation of a deed of real estate by the striking out of a clause of defeasance inserted by a mutual mistake of the parties.

BILL IN EQUITY, filed in the Superior Court on January 12, 1910, by a son of Catherine Kennedy, late of Natick, against the administrator of her estate and her heirs at law, for the reformation of a deed of real estate given by her to the plaintiff, which, it was alleged, was intended to convey an estate in fee simple but by mutual mistake was made in the form of a mortgage.

The case was referred to John W. Saxe, Esquire, as master. Exceptions to the master's report were overruled by *Bell, J.*, who made a decree, the first paragraph of which read as follows:

"This case came on to be heard at this sitting and was argued by counsel, and it appearing to the court that the mortgage of four hundred dollars set forth in the bill of complaint was drawn by mutual mistake in such manner that although it was intended by the parties to convey an estate absolute and in fee simple in the real estate therein described a defeasance clause was included in said instrument; and thereupon upon consideration thereof it is ordered, adjudged and decreed that said instrument be reformed by striking out said clause of defeasance and that said instrument shall be held, construed and regarded as having conveyed an estate absolute and in fee simple in said property therein described any words in said instrument as originally drawn to the contrary notwithstanding."

The defendants appealed.

F. H. Stevens, for the defendants.

M. T. Hall, for the plaintiff, was not called upon.

DE COURCY, J. This is a bill in equity for the reformation of an instrument given by Catherine Kennedy to her son Richard W. Kennedy, the plaintiff, which was intended by the parties to convey an estate in fee simple in the estate therein described, but by mutual mistake was made in the form of a mortgage. The master finds as follows: The plaintiff agreed to purchase this "homestead" estate for \$1,200, which was a fair price; \$800 of this was to be obtained from the Natick Five Cents Savings Bank upon a note given by Catherine Kennedy and secured by a mortgage on the

homestead. The payment of this mortgage the plaintiff was to assume, and he was also to give to his mother a note and second mortgage for the remaining \$400. The preparation of the legal papers was entrusted to the attorney for the bank; and instead of making a deed to the plaintiff and a mortgage back from him to his mother, he made out a mortgage to the plaintiff, and no deed. About two and a half years later the plaintiff gave to the savings bank a mortgage on various properties, including this homestead, and in so doing acted entirely in good faith, supposing that the legal title was vested in him; and the same attorney prepared the papers, — one of which was a discharge of the mortgage for \$800 given by Catherine Kennedy to the bank. In connection with this last loan the plaintiff as owner procured insurance on the homestead payable in case of loss to the Natick Five Cents Savings Bank, first mortgage, and the balance, if any, to Catherine Kennedy, second mortgagee, as their interests may appear. Until the death of his mother, about three and a half years after the execution of the instrument in question, the plaintiff collected the rent that was paid, made repairs on the house and barn, paid the taxes, water rates, insurance and the interest on the bank mortgage, and in other ways acted as the owner in possession. After her death, and when a tenant refused to pay rent, the plaintiff for the first time discovered the mistake that was made, and that he held a mortgage instead of a deed of the homestead. The attorney, who admitted that there should be a deed to the plaintiff, sought to find the same, but died before the matter was adjusted and this litigation followed.

The exceptions of the defendants to the master's report raise the question whether these findings of fact were warranted by the evidence before him. We do not deem it necessary or profitable to recite in detail the testimony, a transcript of which accompanies the report. It is sufficient to say that there was ample warrant for every finding of fact, and that circumstances as to which there is no controversy afford the support of strong probability to the plaintiff's contention. The case presents one of those family disputes, involving irreconcilable conflict of testimony and dependent largely for its solution upon the credibility of witnesses; and we cannot say that the master, who had the opportunity to observe and compare the witnesses while under examination, was wrong

in reaching his conclusions. The delay in discovering the mistake, which under other circumstances might preclude recovery on the ground of laches, evidently was accounted for satisfactorily to the master by the plaintiff's method of carrying on business, his relations to Catherine Kennedy, and his entire reliance upon the attorney for the bank in the preparation of the papers.

The statute of frauds does not operate to prevent the reformation of the instrument by means of striking out the clause of defeasance that was inserted by mutual mistake. No attempt is made to insert a parcel of land that was omitted from the writing, or to construct an agreement by introducing a new element that is required by the statute to be reduced to writing in order to make the agreement binding. *Canedy v. Marcy*, 13 Gray, 373. *Sawyer v. Hovey*, 3 Allen, 331. *Goode v. Riley*, 153 Mass. 585.

The plaintiff's case seems to have been made out by clear and convincing proof, and the decree overruling the exceptions is adapted to make the instrument conform to the real intention of the parties. *Long v. Athol*, 196 Mass. 497, and cases cited. The entry must be

Decree affirmed with costs.



IRA W. SHAPIRA vs. WILDEY SAVINGS BANK.

Suffolk. December 6, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, Mistake, Negligence barring suit. *Sale*, Rescission. *Negligence*.

In a suit in equity against a savings bank for a rescission of a sale and an assignment to the plaintiff of an overdue mortgage of real estate held by the defendant and for a return to the plaintiff of the purchase money, the evidence warranted the finding of the following facts: The plaintiff, in negotiations with the defendant preceding the purchase of the mortgage, inquired by telephone as to the size of the lot of land covered by it, and the defendant's president stated its bounds on certain streets, and gave its area as twelve thousand feet. The plaintiff visited the lot and verified the measurements given to him by the defendant's president. There was no mark upon the face of the earth to indicate any actual or contemplated division of the lot. The plaintiff and the defendant's president then had a conference at the bank, when the measurements given to the plaintiff by tele-

phone were again stated to him and the plaintiff was told that the defendant's examiner, an attorney at law and a specialist in the searching of titles, had approved of the title. Thereupon the plaintiff purchased the mortgage, and the defendant's examiner caused an assignment of it to be made to him. The plaintiff foreclosed the mortgage by sale and purchased at the foreclosure sale, and then for the first time discovered that, after the mortgage had been given, the defendant had given a partial release therefrom of a large part of the mortgaged premises, so that by his purchase and the assignment the plaintiff had paid \$11,000 for a mortgage worth only \$6,000. This release had been given to make the mortgage conform to the application which the mortgagor had made, in which he had made an arbitrary division of the lot. The defendant's president, when he made to the plaintiff the statements regarding the amount of land covered by the mortgage, and the attorney, when he made the assignment, "although well knowing, forgot and overlooked the fact of the [partial] release." The plaintiff offered to return the assignment and the mortgage note and whatever he had received as rent from the real estate. *Held*, that the evidence warranted findings that there had been a mutual mistake as to the property covered by the mortgage, that the plaintiff had not been guilty of negligence in relying upon the representations of the defendant's president, and that the defendant could be put in *statu quo*, so that the plaintiff was entitled to relief.

BILL IN EQUITY, filed in the Superior Court on October 27, 1910, seeking a rescission of a purchase by the plaintiff from the defendant of a mortgage of real estate made to the defendant by one John J. Johnston, junior.

The case was heard by *Pierce, J.*, the evidence being taken by a commissioner appointed under Equity Rule 35. The judge filed a memorandum of his findings, from which it appeared that he found, besides the facts recited in the opinion, the following:

During the negotiations preceding the purchase, in "a reply to a question the plaintiff was told that the bank had had the title examined and proved by their examiner, Mr. [Henry E.] Ruggles, an attorney-at-law and a specialist in the searching of titles.

"Following this agreement, the bank through its attorney Ruggles caused an assignment of the mortgage to be executed, and the same was delivered on the day of its date at the registry of deeds by Mr. Ruggles, acting for the bank, to the plaintiff.

"The plaintiff shortly after proceeded to advertise the property in foreclosure, and at the end of the statutory period and on the day named for the sale purchased the property in the name of his mother-in-law, who admits she holds the legal title in naked trust for the plaintiff and stands ready to do with the same as the plaintiff may direct.

"After the sale the plaintiff learned from his architect and an

attorney who searched the title that the assignment of the mortgage did not transfer, as security for the payment of the debt named therein, the whole property described in the mortgage, which property was the lot above described, but did transfer less than half in area and in value. The difference in value was at least \$5,000."

A final decree was entered in substance as follows:

"1. That by reason of a mutual mistake, induced by the statements of the defendant's officers, the plaintiff is entitled to rescind the transaction of purchase of the mortgage referred to in the bill, restoring the consideration actually received by him.

"2. That on tender by the plaintiff to the defendant of the mortgage and note referred to in the bill, together with a release of all her right, title and interest, duly executed by Celia Urofsky, the purchaser at the mortgage sale referred to, the plaintiff recover from the defendant Bank the sum of \$12,103.47, being the amount of the plaintiff's payment to the said Bank and disbursements on account of said transaction of purchase, less the amount of rents collected by him, with interest from the sixth day of May, 1910, — a total of \$13,547.51, together with" costs.

The defendant appealed.

R. Y. Fitzgerald, (*W. A. Cole* with him,) for the defendant.

G. W. Anderson, (*D. Stoneman* with him,) for the plaintiff.

DE COURCY, J. The judge of the Superior Court, sitting in equity, saw and heard the witnesses, and under the familiar rule his findings of fact will not be reversed unless they are plainly wrong. We are of opinion that he was warranted by the evidence in finding these material facts: The defendant held an overdue note and mortgage made by one Johnston, and in accordance with its business policy wanted to dispose of them without foreclosing. The plaintiff negotiated for their purchase, and in reply to his inquiry by telephone as to the number of feet of land covered by the mortgage, the defendant's president stated: "Dorchester Avenue, 103.15 feet, Greenmount Street, 108.75 feet, rear, 107.50 feet, side, 125 feet: — 12,232 square feet." The plaintiff then visited and examined the premises. On Dorchester Avenue was a one story building of cement construction, containing six narrow stores. A passageway from Greenmount Street on the north afforded access to the rear of these stores, and apparently to the land behind

them, on which was a large dwelling house. On Greenmount Street a granolithic walk extended 108.75 feet, from Dorchester Avenue on the east to the line of fence on the westerly side of the entire lot; and there was no mark upon the face of the earth to indicate any actual or contemplated division. The plaintiff paced the sides of the lot and ascertained that they measured approximately the distances given to him over the telephone by the defendant's president. A conference at the bank followed, the same measurements of the lot were stated by the president, and the plaintiff bought and took an assignment of the mortgage.

Later, after a foreclosure sale of the property, the plaintiff learned that the assignment did not transfer to him as security the whole lot described therein, which was the same as above stated, but only a portion that was less than one half in area and in value. The mortgage when written embraced the entire lot owned by the mortgagor. But in making his application for the loan the mortgagor had made an arbitrary division that separated the front portion including the stores from the rear part on which the dwelling house stood; consequently the bank within a month gave to the mortgagor a release of so much of the lot as was not included in the application for the loan. The president, when he made to the plaintiff the statements herein mentioned, and the bank's attorney, when he made the assignment, "although well knowing, forgot and overlooked the fact of the release;" and the plaintiff was in absolute ignorance of its existence and relied upon the statements of the bank representative. There was a mutual mistake as to the property embraced by the mortgage, and a substantial failure of consideration, because unless the mistake be corrected, it will subject the plaintiff to a loss of more than \$5,000 in an \$11,000 transaction.

Upon these findings the plaintiff is entitled to the relief prayed for unless he was so negligent in relying upon the representations of the bank's president as to deprive him of the right, or the parties cannot be put in *statu quo*. *Spurr v. Benedict*, 99 Mass. 463. *Keene v. Demelman*, 172 Mass. 17. *Livingstone v. Murphy*, 187 Mass. 315. *Long v. Athol*, 196 Mass. 497.

The trial judge found that although an examination of the records at the time of the passing of the mortgage assignment would have disclosed the partial release, yet in view of all the circum-

stances a reasonably prudent man would not have acted otherwise than did this plaintiff. We cannot say as matter of law that the evidence does not justify this finding. *Arnold v. Teel*, 182 Mass. 1. *Long v. Athol*, 196 Mass. 497. The plaintiff was dealing with a savings bank, whose officers had no inclination or financial interest to deal with him unfairly, as he knew from experience. He had confidence in the ability of the attorney who had examined the title for the bank and who had written the mortgage; and he reasonably might assume that he was succeeding to the rights given to the bank by that mortgage. It is true that an examination of the records subsequent to the date of the mortgage which he bought would have disclosed the fact that the bank had released a portion of the land; but that fact was peculiarly within the knowledge of the defendant, and we cannot say that he was culpably negligent in relying upon the statements of its president in effect that the mortgage was the same as when it was executed.

It also seems apparent that the defendant can be put in a legal sense in *statu quo* as to all essential matters by the carrying out of the decree appealed from. *Long v. Athol*, 196 Mass. 497.

Decree affirmed with costs.

GEORGE H. RICHARDS, trustee, *vs.* CHURCH HOME FOR ORPHAN AND DESTITUTE CHILDREN & others.

Suffolk. December 9, 1912. — January 29, 1913.

Present: HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Trust, Charitable. Devise and Legacy. Massachusetts General Hospital.

A widow, whose husband had died in 1834 after having been insane and treated by physicians who had been influential in the establishment of the Massachusetts General Hospital and particularly of the McLean Asylum for the Insane, which was maintained by it, made a will in 1869, in which she provided that two thirds of a trust fund should be paid by the trustee under her will "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the Asylum of the Corporation." The testatrix died in 1870. The Massachusetts General Hospital was incorporated by St. 1810, c. 94, and from about 1818 had maintained the McLean Asylum for the treatment of the insane and in 1869 was the only charitable corpora-

tion in the Commonwealth for the treatment of the insane. The Massachusetts Hospital Life Insurance Company was chartered by St. 1817, c. 180, and, its charter giving it no power to act as trustee under the provisions of the will, it declined to act. By §§ 7, 8 of its charter it was obliged to pay a certain share of its profits from insurance to the Massachusetts General Hospital. On a bill in equity by the trustee for instructions, a single justice ordered a decree that the designated fund be paid to the Massachusetts General Hospital as trustee, and reported the case. *Held*, that the trust was for a charitable purpose; that the testatrix, by the words "Asylum of the Corporation," meant the McLean Asylum; that, since the trustee designated in the will could not act, it merely was necessary to appoint a new trustee; and that under the circumstances it was fitting that the Massachusetts General Hospital should act as such trustee.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 22, 1911, by the trustee under the will of Sarah Elizabeth Cazenove, late of Boston, for instructions as to what disposition he should make of a fund of about \$90,000 which remained in his hands subject to the following provision in the will:

"Fourteenth, all the rest and residue of this Trust Fund, be the same more or less, I direct my Trustee to pay over as follows: one third part to the 'Church Home,' so called, in the City of Boston, for the general uses and purposes of the Society, and the other two thirds part to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the Asylum of the Corporation."

The Massachusetts Hospital Life Insurance Company had no power under its charter to accept or administer the trust, and declined it.

The case was heard by *Hammond, J.*, upon an agreed statement of facts, from which it appeared that the testatrix made her will on May 18, 1869, and died on December 6, 1870, at the age of sixty-four, having lived for the greater part of her life in Boston. Her husband had died in 1834. The Massachusetts General Hospital was incorporated by St. 1810, c. 94. In 1818 it constructed a hospital building in Boston, and at or about that time a building in Somerville for treatment of the insane. This department of the hospital at first was called the McLean Asylum, in memory of one of the principal benefactors of the hospital, and in 1895 it was removed to Waverley, and is now located there, being known as the McLean Hospital. At all times it has been maintained and conducted as an asylum for the insane, solely by the Massachusetts General Hospital, and it is a part of the Massachusetts General

Hospital, and has never been a separate organization. The Massachusetts General Hospital at the time the will was drawn was in fact the only charitable corporation in Massachusetts for treatment of the insane. Funds specially set apart for the endowment of the McLean Hospital are held by the Massachusetts General Hospital, but the income from this endowment meets only a part of the expenses. Income from such endowments is used partly to maintain free beds and partly to pay the expense of patients who are not able to pay the whole cost of service to them. Pauper insane are, and always have been, removed to some State institution. The Massachusetts General Hospital at the time this will was made was sometimes known as and called the "Massachusetts Hospital."

Charles J. Cazenove, husband of the testatrix, was a merchant in Boston. At the time of his decease, in 1834, he was insane, his malady being due to an accident. He was never an inmate of the McLean Asylum, or, so far as known, of any asylum, but was cared for in his own home in Boston during his last illness. During his last sickness he was treated by Dr. John C. Warren and Dr. Rufus Wyman. Both of these physicians were then affiliated with the Massachusetts General Hospital. Dr. Wyman was the first physician to occupy the position of physician and superintendent of the McLean Asylum, and Dr. John C. Warren was one of the founders of the hospital, a circular letter from Dr. Warren and Dr. James Jackson to wealthy citizens of Boston being the first step in a campaign to raise funds to establish the hospital.

The single justice in his report of the case stated: "I was unable to find as a matter of fact that by the words 'Massachusetts Hospital Life Insurance Company' the testatrix meant 'Massachusetts General Hospital,' but I ruled that the dominant purpose of the testatrix was to make the gift charitable, and that it is a charitable gift. I further ruled that, since the Massachusetts Hospital Life Insurance Company declines to act to carry out this charitable purpose, the doctrine of *cy pres* may be applied, and I found as a fact that the Massachusetts General Hospital is pre-eminently fitted to take the fund and carry out the charitable purpose of the testatrix. I accordingly ordered that there be a decree, (1) That one third part of the residue in question be paid to the defendant Church Home for Orphan and Destitute Chil-

dren; (2) That two thirds of the residue in question be paid to the defendant Massachusetts General Hospital."

At the request of certain of the next of kin of the testatrix, the single justice reported the case for determination by the full court.

L. H. H. Johnson, for the plaintiff, stated the case.

H. S. Davis, for Anne W. Sherman and others.

F. E. Barnard, for Harriet G. Bartlett and another, submitted a brief.

J. Abbott, for the Massachusetts General Hospital.

SHELDON, J. This case has been reported to the full court by a single justice upon the pleadings, the agreed facts and his own findings. The statement of facts agreed gives power to draw inferences therefrom. The question is as to the bequest in the fourteenth clause of the will of Sarah E. Cazenove of two thirds of the residue of a trust fund "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the asylum of the corporation." This was upon its face a good charitable gift to the legatee named for the purpose specified by the testatrix. And in our opinion it sufficiently appears that by the words "the asylum of the corporation" the testatrix meant the McLean Asylum, now called the McLean Hospital, which was then and still is maintained as an asylum for the insane by the Massachusetts General Hospital. That was not merely the only charitable corporation in this Commonwealth for the treatment of the insane, but it was one with which the insurance company named as the legatee had a direct connection. The insurance company, by the terms of its charter (St. 1817, c. 180, §§ 7, 8), was obliged to pay a certain share of its profits from the insurance business to the Massachusetts General Hospital, and thus to contribute to the maintenance of this asylum. It was not wholly an inaccurate description of the asylum to call it the asylum of the insurance company; for it was the asylum, and the only asylum, which for its support might be dependent in part upon the contribution which the insurance company would be required to make. Certainly this description could be applied to no other asylum for the insane. That is enough.

We have then a bequest made to a designated trustee for a definite charitable purpose; but the trustee declines to accept the bequest or to carry out the trust, and indeed has not by its charter

the power to do so. The trust can however as well be administered by any other trustee as by the one whom the testatrix selected. In such a case the charitable purpose should not be defeated by the failure or inability of the trustee to act, but a new trustee should be appointed to administer the trust in the manner appointed by the testatrix. It is not like the cases relied on by her next of kin, in which the charitable purposes cannot be carried out and must be either abandoned or administered on the *cy pres* doctrine; and those decisions are not applicable here. It is merely necessary to appoint a new trustee. The case at bar resembles more nearly *Richardson v. Mullery*, 200 Mass. 247, than *Bowden v. Brown*, 200 Mass. 269, though it differs from both of them in the fact that here the charitable purpose of the testatrix can be fully and exactly carried out by another trustee than the one nominated in the will. Under these circumstances it is eminently fitting that the legal title should be taken and the trust administered by the Massachusetts General Hospital, the owner and maintainer of the asylum in question.

The finding of the single justice was not, as has been claimed by the next of kin, that the testatrix did not intend to make a gift for the benefit of the McLean Asylum, but merely that the bequest was not made to the Massachusetts General Hospital. We agree with the finding. The bequest was made to the insurance company, though in trust for the benefit of the asylum, as has been said.

It is plain, and has not been disputed, that the other one third part of this fund should be paid to the Church Home for Orphan and Destitute Children.

The petitioner is to be instructed that one third part of this fund should be paid to the Church Home just mentioned, and two thirds thereof to the Massachusetts General Hospital, to be used only, so far as it will go, to provide free treatment for the insane in the McLean Asylum or Hospital.

Decree accordingly.

LAURA I. PICKFORD vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 11, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway.

If the conductor of a crowded electric street car, after his car has stopped to take on passengers, gives the signal to start the car when he is inside the forward part of it, without making any effort to ascertain what or how many passengers are attempting to get upon the car and whether they actually have got upon it, thereby throwing to the ground a woman passenger who is in the act of boarding the car, in an action by such passenger for her injuries thus caused these facts are evidence of the conductor's negligence.

In an action by a woman against a corporation operating a street railway, for personal injuries sustained by reason of the starting of a car of the defendant when the plaintiff was in the act of boarding it, where it appears that the car was extremely crowded and had stopped to take on passengers at a place where many passengers ordinarily boarded the defendant's cars and that the conductor was inside the forward part of the car, evidence, that the conductor called out to the passengers on the rear platform, "Is it all right?" and received the reply, "All right, go ahead," and that relying on this assurance he gave the signal to start the car, does not, if believed, show as matter of law that the conductor was in the exercise of due care, it being a question for the jury whether under the circumstances shown the conductor was justified in relying on such assurance.

TORT, for personal injuries sustained at about 11.30 P. M. on March 12, 1910, from being thrown to the ground by the starting of an electric street car of the defendant when the plaintiff was in the act of boarding it as a passenger at the corner of Boylston Street and Dartmouth Street in Boston. Writ dated March 19, 1910.

In the Superior Court the case was tried before *Irwin, J.* The plaintiff testified that, while waiting for a car to take her to her home in Arlington, she had allowed two other Arlington cars to pass, as they were crowded; that when this car finally stopped there were two elderly ladies and a man named Yates in addition to herself who desired to take the car; that Yates helped the elderly ladies on to the car; that the plaintiff had a dress suit case in her right hand and that Yates had hold of her by the left arm and was

helping her on to the car when the car started; that Yates ran along with her for some little distance and finally, when he no longer could keep up with the car, she fell off, landing with her back against the dress suit case which had fallen to the street; that she heard no bells rung at any time and that she did not see the conductor of the car.

The conductor of the car at the time of the accident was called as a witness by the defendant, and testified that the car on that evening was extremely crowded and that he collected ninety-five fares during the trip; that the car was an ordinary box car with seats for thirty-eight passengers; that he remembered that he had stopped at the corner of Boylston Street and Dartmouth Street; that he also remembered that he was in the front end of his car collecting fares; that as the car came to a stop at Dartmouth Street he looked out of one of the front windows and saw three or four persons waiting to take the car; that after the car had come to a standstill and several persons had boarded it he thought that everybody had boarded it who desired to do so and called out from his position in the front of the car, "Is it all right?" and received a reply from the rear platform, "All right, go ahead;" that he gave the two bells and nothing was said to him by any one as to any person having fallen. On cross-examination he testified that the Dartmouth Street stop was one of the most important stops on the trip; that many passengers ordinarily boarded the cars there; that he did not know who it was that "hollered out," whether a man or a woman, though he did not remember or see any woman upon the rear platform.

At the close of the evidence the defendant asked the judge to give the following instructions:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. If at the time of the alleged accident the conductor of the car was inside his car near the front end for the purpose of collecting fares, and, if at that time the car was extremely crowded, making his passage up and down the car slow, tedious and a matter of great discomfort to the passengers in the car, and, if after the car had stopped a proper length of time for the purpose of allowing passengers either to board it or alight from it, the conductor called

out to some one or more passengers who were standing on the rear platform of the car to ask if it was 'all right' to start the car, and, if on receiving the reply from one or more passengers on the rear platform that it was 'all right' to start the car, and, if there was nothing in the appearance or deportment of the passengers who thus stated that it was 'all right' to start it to lead the conductor in the exercise of proper care to believe that they were not qualified to determine whether it was safe thus to give the signal to start the car, then, if the conductor acted upon their statement and gave the bells to start, he is not guilty of negligence and the defendant is entitled to a verdict in this case."

The judge refused to give these instructions, but gave an instruction, numbered three, which also was requested by the defendant, that, under the circumstances assumed in the second request, it was a question for the jury whether or not such conduct on the part of the conductor constituted negligence.

The jury returned a verdict for the plaintiff in the sum of \$5,000, of which by requirement of the judge the plaintiff afterwards remitted all in excess of \$3,500; and the defendant alleged exceptions to the refusal of his first two requests for instructions.

E. P. Saltonstall, for the defendant.

R. H. Sherman, for the plaintiff.

SHELDON, J. The case was for the jury. There was evidence both of due care of the plaintiff and of negligence on the part of the defendant's conductor. The conductor, although he was then at the front end of his car collecting fares, knew, or it could be found that he knew, that the car had stopped to take on passengers, and that the car was extremely crowded, so that probably there might be difficulty and delay in their getting on the car, especially if any of the new passengers were elderly women, as might be and was the case. But except for his own testimony, which of course was wholly for the jury, there was no evidence that he made any effort to ascertain what or how many passengers were attempting to get upon his car, or whether they actually had got upon it. The jury could have found that he caused his car to be started without concerning himself with these questions. Manifestly the case was for the jury.

The defendant's second request for instructions was rightly refused. It cannot be said upon the conductor's own testimony that he was justified in relying upon an assurance from one or more passengers upon the rear platform that it was "all right" and that he should "go ahead." The time of day, the crowded condition of the rear platform, any haste or impatience of belated passengers, and many other circumstances easy to conceive of might affect the degree of reliance that he would be justified in putting upon such an assurance. It was *prima facie* for him to determine whether new passengers had reached a position of safety upon his car; it cannot be said as matter of law that the circumstances justified him in delegating this duty to other passengers. The instructions given to the jury sufficiently guarded the defendant's rights.

Exceptions overruled.

JAMES J. BURNS, administrator, vs. F. KNIGHT AND SON CORPORATION.

Suffolk. December 12, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Of child, In use of highway. *Practice*, Civil, Judge's charge. *Evidence*, Presumptions and burden of proof.

In an action for causing the death of a boy seven years and five months of age, where the jury were instructed that the boy was not in the exercise of due care in placing himself where he incurred the injury that caused his death "if he appreciated the danger that there was in putting himself in the place where he was," it was *held*, that the instruction certainly was sufficiently favorable to the defendant, and it was *said*, that one of the reasons that a child is not to be expected to exercise the same degree of care as an adult is his lack of appreciation of the risks he may be running.

It is not necessarily negligent for an ordinarily bright boy seven years and five months of age, who sees men with horses moving a heavy iron girder along the ground, to stand within the natural forward course of a roller on which the girder is laid, and at the trial of an action for causing the death of the boy by allowing the roller to run over him, it is right for the presiding judge to refuse to make a ruling that if the boy so stood he was not in the exercise of due care, especially where it appears that the boy was in the centre of the sidewalk of a public street and that the roller was lying in the gutter below the level of the

sidewalk before it suddenly was started into motion, and where it is not a conceded fact that the boy had seen the roller or was at fault in not having seen it.

In an action against a corporation engaged in a general teaming business, for causing the death of the plaintiff's intestate through the negligence of a driver of a dray of the defendant, where it appears that the accident happened after half past six o'clock in the evening, it is proper for the judge in his charge to suggest to the jury that they may consider whether it was the time of night when the driver was in a hurry to finish his work and to get home and feed his horses, although there has been no direct evidence that the driver was in a hurry.

TORT, by the administrator of the estate of Thomas Burns against a corporation engaged in a general teaming business, for causing the death of the plaintiff's intestate, a boy seven years, five months and ten days old, on August 19, 1910, at or near the corner of Webber Street and Douglas Avenue in that part of Boston called Roxbury. Writ dated September 7, 1910.

In the Superior Court the case was tried before *Dubuque, J.* On the day of the accident the defendant was employed by an iron company, having a place of business on Webber Street, to move some heavy iron beams from Jamaica Plain to such place of business. Adjacent to the iron company's yard was an open lot over which was a roadway called Douglas Avenue running from Webber Street, which was a public way, to another street parallel to Webber Street. The defendant's driver, one Kellough, brought a load consisting of six or seven of the beams, on a four horse dray, to the iron company's yard. As he turned in from Webber Street upon Douglas Avenue his rear wheels sank into the mud and he was unable to proceed. He thereupon threw off three or four of the beams and proceeded with the rest of the load across the open lot over which Douglas Avenue ran to the yard of the iron company, which had an entrance on this open lot. He then unhitched the two "lead horses" and proceeded to draw the remaining beams over the surface of the ground on rollers by means of a chain attached to the rear end of the beams and passing along them to where the chain was hitched to the horses at the front end. These beams as they lay on the ground extended along Douglas Avenue, across the sidewalk on Webber Street to about the middle of that street. Two or three of the beams had been drawn into the iron company's yard without incident. While the third or fourth was be-

ing drawn across the sidewalk of Webber Street in this manner, the plaintiff's intestate was caught under the rear roller, while on the sidewalk, and received injuries from which he died within a few minutes.

The plaintiff, who was the father of his intestate, testified that he lived at 29 Webber Street, two houses from the junction of that street and Douglas Avenue; that on the day of the accident the family had supper at about a quarter past six o'clock, and that the intestate and the witness's little girl, about five years old, went out together after supper at about half past six; that the boy told him where he was going; and that almost immediately there was a commotion in the street and he went out and found that his boy had been hurt and sent to the hospital. He further testified that the intestate was a bright and intelligent little boy.

One Coughlin, a witness called by the plaintiff, testified, among other things, as follows: "I saw the driver start his horses on the girder which hurt the Burns boy. I saw the Burns boy and the girl on the sidewalk on Webber Street, that is on the sidewalk on the Douglas Avenue side of Webber Street. When I first saw them they were coming from their house and I should judge they were about to go down the street toward Harrison Avenue. They were going in the direction of Harrison Avenue. These columns having the sidewalk blockaded, it was impossible for them to cross. Meanwhile the horses had started without any signal whatsoever, and caught this young chap's foot and knocked him. At the time the boy was knocked down they were right in the centre of the sidewalk. They were walking along and just at the time they came so near to the iron the horses had started and caught his foot and knocked him and rolled up on him. It was the roller that hit his foot; it knocked him and the roller went right up on his body. It seemed that the roller was in the gutter, and the end of the column had cut the street and it dug the street until it got on to this roller and then it rolled. . . . When it struck the roller, the roller started rolling and rolled until it caught the boy. It stopped then. Mr. Reiser, another man who was there, hollered to the teamster. Until Mr. Reiser hollered the horses kept on going, and then the driver stopped and I helped release the boy. When I went over to help release the boy, the roller was about up to his neck and

shoulders. At the time of the accident the driver was at the front end of the column with the reins."

Reiser, referred to in the foregoing testimony, also was called as a witness by the plaintiff and gave a similar description of the accident. He testified that, when the driver stopped his horses and the roller stopped rolling, the boy who had been run over was about in the centre of the sidewalk, and that the roller was about five feet long and six or seven inches in diameter.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover."

"3. On all the evidence the plaintiff's intestate was not in the exercise of due care, and therefore the plaintiff cannot recover."

"5. It is not due care on the part of an ordinary bright child of seven years and five months of age, who sees men with horses moving a heavy iron girder along the ground, to stand within the natural forward course of a roller above which the girder is laid.

"6. It is not due care on the part of an ordinarily bright child of seven years and five months of age, who sees men with horses moving a heavy iron girder along the ground, to stand within the natural forward course of a roller above which the girder is laid, even though as a matter of fact the girder may not be resting on the roller and the roller may at the time be stationary.

"7. It is not due care on the part of an ordinarily bright child of seven years and five months of age to stand within a foot or a foot and a half of a heavy iron girder that is being drawn over unprepared ground by a pair of horses hitched to a chain attached to the girder."

The judge refused to make any of these rulings. He made the fourth ruling requested by the defendant with a qualification. That ruling was as follows, the qualification added by the judge being enclosed in brackets:

"4. If the plaintiff's intestate knew, or if an ordinarily prudent child of his age ought to have known, that the girder was being drawn over rollers by horses attached to the front end, he was not in the exercise of due care if he placed himself in front of one of the rollers, [if he appreciated the danger that there was in putting himself in the place where he was]."

The defendant, besides excepting to the refusals of rulings
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stated above, excepted to certain portions of the judge's charge, stating his exception in part as follows: "I desire to except to that portion of your honor's charge in which you suggested to the jury the question of whether it was the time of night when Kellough was in a hurry to get home and feed his horses; and again, where you said was he anxious and in a hurry to get the girders into the yard, there being as I recollect it no testimony upon which such a suggestion can properly be made by the court."

The jury returned a verdict for the plaintiff in the sum of \$7,500; and the defendant alleged exceptions.

E. K. Arnold, for the defendant.

J. W. McAnarney, (*T. F. McAnarney* with him,) for the plaintiff.

SHELDON, J. The judge at the trial acted rightly in refusing the defendant's first and third requests and in submitting the case to the jury.

There was evidence that the accident was due to negligence of the defendant's driver Kellough. Indeed this hardly has been contested.

It could be found also that the plaintiff's intestate was in the exercise of as high a degree of care as properly could be expected from one of his age. According to the testimony of Coughlin the intestate was walking along the sidewalk until his progress was stopped by the girder. Then Kellough suddenly started the horses to pull the girder; the roller was drawn across the sidewalk, caught the intestate's foot, knocked him down and rolled upon his body. He had no warning of the starting of the horses or of the danger of his foot being caught. No caution was given to him by Kellough or any one else. He was not bound to anticipate that the girder would be started or that there would be a protruding roller likely to hit him or to catch his foot. It could be found that he had not seen the other girders drawn away, and that there was absolutely nothing to indicate the presence of any impending danger. Under such circumstances it would have been wrong to rule that his conduct was negligent.

The giving of the fourth request with the qualification added to it by the judge certainly was sufficiently favorable to the defendant. One of the reasons why a child is not held to the same degree of care as if he were an adult is lack of appreciation of the risks that he may be running.

The other requests were rightly refused. The assumptions made in them, if found by the jury to be correct, would have a bearing upon the question of the boy's due care, but would not be conclusive against him. It was not a conceded fact, as was assumed in the fifth and sixth requests, that he had seen or that he was at fault for not having seen the roller which struck him, lying as it was in the gutter below the level of the sidewalk on which he stood. And there would be serious difficulty in applying the rule of the seventh request even to an adult.

The exception to what the judge said to the jury, about the lateness of the hour and as to whether Kellough was in a hurry to feed his horses and get home, cannot be sustained. It was proper to call the attention of the jury to the subject. The case does not resemble *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 516. It does not need direct evidence to enable a jury to say that this may be so at a time between half-past six and seven o'clock in the evening, and the fact might have a bearing upon Kellough's conduct and the inferences to be drawn from it.

None of the other exceptions requires discussion.

Exceptions overruled.

WALLACE N. RIVERS vs. JAMES L. RICHARDS & others.

Middlesex. December 12, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, *Res ipsa loquitur*. *Practice*, *Civil*, Exceptions.
Evidence, Opinion: experts, Competency.

In an action by an oiler of machinery against his employer for personal injuries alleged to have been caused by a defect in the machinery, where there is evidence that for a time before the accident the machinery was running somewhat differently from usual, if the plaintiff testifies that at the time of the accident he was doing his work in the way in which he had been directed to do it by the servant of the defendant entrusted with the duty of instructing him, it is a question for the jury whether the plaintiff in continuing to work was in the exercise of due care and also whether he appreciated the danger to which he was exposed and assumed the risk of it.

In an action, by one employed as an oiler of machinery which was used as a part of a complicated device for transferring coal from a coal tower to cars running upon a cable railway, against his employer for personal injuries, if there is evi-

dence that the plaintiff for the purpose of oiling a part of the machinery put his hand into a space extending about four inches above a pan filled with coal, which in the ordinary and normal operation of the machinery should have remained unchanged during the time required for oiling, but that the pan moved up until the space was reduced so much that the plaintiff's hand was crushed, this movement of the pan, if unexplained, is in itself evidence of a want of repair which may be due to the negligence of the person who was in responsible control of the machinery; and, if a portion of the plaintiff's evidence indicates that the act of a fellow servant in letting coal drop into the pan was the cause of the accident but other portions of the plaintiff's evidence tend to show that the unexplained automatic action of the machinery was the cause, it is for the jury to say whether the movement of the machinery was automatic.

At the argument of an exception to the admission of certain testimony given by a witness called as an expert in regard to an alleged defect in complicated machinery the objection is not open that the witness had not sufficient knowledge either of the general subject or of the particular mechanism, if no question in regard to the qualification of the witness as an expert was raised at the trial.

An exception to a competent question put to a witness cannot be sustained on the ground that the answer to it was largely irresponsive and incompetent, if no motion was made to strike out the answer in whole or in part.

In an action by a workman against his employer for personal injuries alleged to have been sustained by reason of a defect in complicated machinery, where an expert called by the plaintiff has testified that the movement of the machine which caused the injury was abnormal and unexpected, such witness should not be allowed to testify further that such movement of the machine might have been avoided by the adoption of a certain device, because the defendant owed the plaintiff no duty to change the character of the machinery that was in use when the plaintiff's employment began, and the admission of such evidence against the defendant's exception is a material error.

TORT, for personal injuries sustained by the plaintiff on January 10, 1910, when he was in the employ of the defendants and was working as an oiler upon the machinery used as part of a complicated device for transferring coal from a coal tower to cars running upon a cable railway. Writ dated April 20, 1910.

In the Superior Court the case was tried before *Lawton, J.*, on May 25, 1911. The plaintiff testified that at the time of the trial he was nineteen years old; that at the time of the accident he had been in the employ of the defendants for about a year and a half, successively as a water boy, a guy man and an oiler; and that he had been an oiler for eight months before the accident happened.

At the close of the plaintiff's evidence the defendants rested, and asked the judge to order a verdict for them. The judge, after conferring with the counsel, submitted the case to the jury under the following stipulation of the parties:

"If the jury shall return a verdict for the plaintiff, the court will at once order the verdict for the plaintiff set aside and will direct the jury to return a verdict for the defendants, and will report the case upon this stipulation between the parties; that if the order directing the jury to find for the defendants is right, the verdict for the defendants shall stand; otherwise judgment shall be entered for the plaintiff for the amount found by the jury. But with this exception: that the defendants do not waive any of their exceptions, and if evidence prejudicial to the defendants has been admitted, or evidence beneficial to the defendants has been excluded and exceptions saved, and if the Supreme Judicial Court shall rule that the case was properly submitted to the jury, then there shall be a new trial.

"The defendants further reserve their right to move to have the verdict for the plaintiff set aside on the ground that the damages are excessive."

The jury returned a verdict for the plaintiff in the sum of \$9,000. Thereupon, in accordance with the foregoing stipulation, the judge set aside the verdict, ordered a verdict for the defendants, and reported the case for determination by this court. The facts necessary for an understanding of the decision of the questions raised by the report are indicated sufficiently in the opinion.

W. J. Corcoran, (W. Flaherty with him,) for the plaintiff.

M. O. Garner, for the defendants.

Rugg, C. J. 1. The plaintiff testified that he was doing his work at the time of the accident in the way in which he had been directed to do it by the servant of the defendants entrusted with the duty of instructing him. This made the question of his due care one of fact to be passed upon by the jury. That the machinery was running somewhat differently for a time before the injury was not decisive. It was still for the jury to say whether the plaintiff appreciated the resulting danger and assumed the risk to which he was subjected. *O'Toole v. Pruyn*, 201 Mass. 126.

2. There was evidence to the effect that the plaintiff put his hand into a space of about four inches above a pan filled with coal, which in the ordinary and normal operation of the machinery should have remained the same during the period of time required by the plaintiff for oiling, but that the pan moved up so that the space was much less and the plaintiff's hand thereby was crushed.

This movement of the mechanism when it should have remained at rest was of itself evidence of a want of repair which might be attributed to some negligence of the person in responsible control. This branch of the case comes within the rule stated with affluent citation of authorities in *Ryan v. Fall River Iron Works*, 200 Mass. 188, and in *Chiuccariello v. Campbell*, 210 Mass. 532. The charge in this respect was too favorable to the defendants.

This is not an instance of a simple device or a particular portion of a machine which can be easily seen and fully understood by any intelligent person and about which there is no complication, and where the plaintiff points to some special thing as the cause of the injury and does not base his claim chiefly on the automatic starting. This was a complicated mechanism made up of many parts, and the plaintiff did not undertake to particularize, but although introducing some testimony as to possible causes of the starting left his case to rest mainly on the unexpected automatic action at a time when the machine should have remained at rest if it had obeyed the laws of its own being and had operated as it was designed to operate. Cases like *Cook v. Newhall*, *ante*, 392, are distinguishable. A part of the plaintiff's testimony indicates the act of an engineer in letting coal drop into the pan as the cause of his injury. Of course, if this was so, the defendants would not be liable. *Cunningham v. Blake & Knowles Steam Pump Works*, 208 Mass. 68. But other portions of his testimony show the automatic movement of the machinery as the cause. It was for the jury to say where the truth was in this conflict or inconsistency of evidence.

3. No question was raised at the trial as to the competency of the witness proffered by the plaintiff as an expert. It must be assumed that the trial judge found him qualified. At all events no objection can be made successfully at this stage on the ground that he had not sufficient knowledge either of the general subject or of the particular mechanism.

4. The question to the expert witness for his opinion as to the cause of the abnormal and unexpected action of the machine was competent. His answer was largely irresponsible and incompetent, but no motion was made to strike out the answer in whole or in part, and hence the exception to the question must be overruled.

5. The same witness was permitted against the defendants'

objection to answer that the abnormal and unexpected action of the machine might have been avoided entirely by putting on a rocking device. This was incompetent and well may have been injurious to the defendants. The defendants owed no duty to the plaintiff to change the construction of the machinery in use at the time the employment began. The defendants' only obligation was to keep in repair the machinery they had, and they were not required to install new or additional safety devices. *Gleason v. Smith*, 172 Mass. 50. *Wolfe v. New Bedford Cordage Co.* 189 Mass. 591. *Mutter v. Lawrence Manuf. Co.* 195 Mass. 517. *McKenna v. Gould Wire Cord Co.* 197 Mass. 406, 411.

In accordance with the terms of the report the entry must be
New trial ordered.

WILLIAM J. WELCH vs. H. LINCOLN CHASE & others.

Norfolk. December 13, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Review. Practice, Civil, Exceptions, Rulings and instructions, New trial. Laches.

The granting of a writ of review is a matter of judicial discretion, and, although erroneous rulings of law made at a hearing upon a petition for the writ are subject to exception, no exception lies to the exercise by a judge of his discretionary power to determine whether, in view of all the circumstances and the situation of the parties interested, it is just and equitable to grant the writ.

At a hearing upon a petition for a writ of review, no exception lies to the refusal of the trial judge to rule, that if certain facts are found the petitioner is entitled to have the writ granted to him, even if the proof of such facts would have a strong bearing upon his right to a review, because there is no absolute right to have the writ granted and other considerations properly might affect the exercise of the discretion of the trial judge.

At a hearing upon a petition for a writ of review, as in other proceedings, the trial judge cannot be required to make a ruling upon a detached portion of the evidence.

Delay in filing exceptions in an action at law after the expiration of an extension of the time allowed for such filing may constitute laches on the part of a petitioner for a writ of review of the judgment in such action, although such petitioner otherwise may have good reason for applying for a writ of review and little wrong or injury may have resulted to the adverse party from the delay.

The denial of a motion for a new trial or hearing upon a petition for a writ of review is a matter of judicial discretion and is not subject to exception.

PETITION, filed on February 12, 1908, for a writ of review of a judgment for the defendants in an action of tort, which was brought by the petitioner as plaintiff and was tried before *Hardy, J.*, who ordered a verdict for the defendants. The judge denied a motion of the plaintiff for a new trial and also denied a motion of the plaintiff to be allowed to file exceptions after the expiration of an extension by agreement of the time allowed for filing such exceptions.

There was a hearing on the petition before *Pierce, J.* The petitioner asked the judge to make the following rulings:

"1. Relief ought to be granted if judgment was rendered against the petitioner by reason of his failure to file his bill of exceptions within the time prescribed by law and his failure was due to a misapprehension of law, and it also appears that his application is otherwise reasonable and just.

"2. The petitioner would not be guilty of laches by reason merely of delay in the filing of his bill of exceptions if his application for a writ of review is founded on sufficient reason, good faith and conscience.

"3. Delay in the filing of the bill of exceptions and the entry of judgment against him would not constitute laches on the petitioner's part if the respondents fail to show in consequence thereof any serious wrong or injury resulting necessarily to themselves therefrom.

"4. On a petition for a writ of review relief ought to be granted if it appear that the rights of the petitioner on the trial of the merits were not properly protected or safeguarded and an error of law by the court appears, or if to dismiss the petition would result in a miscarriage of justice."

The judge refused to make any of the rulings requested, and ordered that the petition be dismissed. The petitioner alleged exceptions.

Later the petitioner filed a petition for a new trial upon his petition for a writ of review, alleging that he should have been granted a writ of review because errors of law were disclosed by the record in the action of tort brought by the petitioner and also alleging the existence of newly discovered evidence to be presented in such action of tort. *Pierce, J.*, denied the motion for a new trial upon the petition for a writ of review; and the petitioner alleged exceptions.

W. J. Welch, pro se.

F. G. Katzmann, for the respondent McLaughlin.

P. O'Laughlin, for the respondent Johnson.

R. Frothingham & J. P. Jackson, Jr., for the respondents Channing and Chase.

SHELDON, J. The petitioner asked for a review of a judgment which had been rendered against him in favor of the respondents in an action of tort which he had brought against them. After a hearing before a judge of the Superior Court his petition was disallowed and dismissed. He has alleged exceptions to this dismissal and to the refusal of the judge to give four rulings requested by the petitioner at the hearing.

It is settled that the first exception cannot be sustained. It was for the judge who heard the petition to determine as a matter of sound judicial discretion whether a review should be granted. No exception lies to the exercise of this discretion. If in the course of the hearing any erroneous rulings were made, either in the admission or exclusion of evidence or in passing upon any other question of law that became material, these may be brought before us upon exceptions. But the exercise of his discretionary power to determine whether, in view of all the circumstances shown before him and the situation and position of the parties interested, it is just and equitable to review proceedings which have been concluded in a court of justice, is, if no specific errors have been committed, final. It is enough to cite two of the many decisions which have settled this rule. *Stillman v. Donovan*, 170 Mass. 360. *Parke v. Murdock*, 177 Mass. 453.

The rulings asked for by the petitioner were rightly refused. The first and fourth of his requests went upon the ground that if certain facts were found which might have a bearing, some of them a strong bearing, upon his right to a review, then he was entitled to have his petition granted, independently of all other considerations and independently of any exercise of discretion on the part of the presiding judge. This could not be so, for the reason already stated.

The second and third of his requests dealt with only a part of the evidence which was before the court, and asked for rulings upon only a detached portion of the case, which of course cannot be required. *Bourne v. Whitman*, 209 Mass. 155, 164. Moreover,

delay to file exceptions in a case before the expiration of the time which has been limited therefor may constitute laches, however good reason the party at fault may have for applying for a writ of review, and however little wrong or injury may have resulted to the party opposing the issue of such a writ.

The petitioner has excepted also to the denial of his petition for a new trial upon his application for a review. But this also is not a subject of exception. *Manzigian v. Boyajian*, 183 Mass. 125. *Boston Bar Association v. Scott*, 209 Mass. 200, 204. *Powers v. Bergman*, 210 Mass. 346. *Lopes v. Connolly*, 210 Mass. 487, 496.

All other matters which have been argued are covered by what has been said. It is not for us to weigh the merits or demerits of the petitioner's claims against the respondents, but only to consider whether any errors of law are shown by his exceptions. As we find no such errors, the exceptions must be overruled.

So ordered.

JOHN NILAND *vs.* BOSTON ELEVATED RAILWAY COMPANY &
another.

Suffolk. December 13, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway.

One, who when travelling as a passenger in a street railway car was injured by reason of the sudden stopping of the car by the motorman in order to avoid a collision with an ice wagon that had come without warning in front of the car, or by reason of a sudden stopping of the car together with an unexplained collision, has upon these facts alone no right of action against the railway company operating the car, there being nothing to indicate its negligence.

TORT for personal injuries sustained on February 25, 1907, at about 11 o'clock A. M., when the plaintiff was a passenger on an electric street car of the defendant Boston Elevated Railway Company, alleged to have been caused by a collision of such car with an ice wagon of the defendant Boston Ice Company. Writ in the Municipal Court of the Roxbury District of the city of Boston dated June 14, 1907.

On appeal to the Superior Court the case was prosecuted against the Boston Elevated Railway Company alone. It first was tried before *Pierce, J.*, who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions, which were sustained by this court in a decision reported in 208 Mass. 476.

There was a new trial of the case before *Quinn, J.* After the plaintiff's evidence the defendant called as a witness one Clark, who was the driver of the ice wagon at the time of the accident. The facts most favorable to the plaintiff which could have been found upon the evidence are stated in the opinion. At the close of all the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. L. Keogh, for the plaintiff.

C. S. French, for the defendant.

RUGG, C. J. When this case was here before, 208 Mass. 476, it was held that it should have been submitted to the jury, because there was evidence that a motorman of the defendant permitted one of its cars, in which the plaintiff was a passenger, to run into an ice wagon standing still upon the track, whereby the plaintiff was injured. There is no such evidence in the present record. The evidence shows now, taken in its aspect most favorable to the plaintiff, that the accident occurred either by reason of the sudden stopping of the car by the motorman in order to avoid a collision with an ice wagon which had come without warning in front of the car, or a sudden stopping coupled with an unexplained collision. This alone was not evidence of negligence. The only explanation afforded by other evidence was that while the driver had left the ice wagon temporarily the horses attached to it veered toward or upon the track, and the motorman brought the car to a quick stop. The case is covered by the first part of the opinion in 208 Mass. 476. *Timms v. Old Colony Street Railway*, 183 Mass. 193. *Byron v. Lynn & Boston Railroad*, 177 Mass. 303. A verdict for the defendant was ordered rightly.

Exceptions overruled.

PETER DAGIS vs. WALWORTH MANUFACTURING COMPANY.

Suffolk. December 13, 1912. — January 29, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

An employee, who, having been told by one acting as a superintendent for his employer to go to work on a certain machine, objects to doing so because he does not know how to run it, but, under a threat of dismissal, goes to work at the machine, does not assume the risk of injury from defects in the machine which are not obvious and of which he does not know and is not warned.

If an employee is put at work upon a machine without his employer or any one with authority from the employer giving him any warning as to the nature of the machine or any instruction as to the way to run it, and is injured by reason of a defective or dangerous condition of the machine and of the method he is using while he is engaged in performing his work in a manner in which he had been told to do it by his fellow employees, the employer cannot escape liability on the ground that, in doing the work in the manner which caused his injury, the employee was acting without authority from him.

If oiling or cleaning a certain machine is necessarily incident to its operation and an employee is set at work upon the machine without any instruction as to the method of running it and is injured by reason of its automatically starting while he is oiling it, the employer cannot escape liability for the injury on the ground that the employee was not directed to oil the machine by him or by any one acting in his behalf.

TORT for personal injuries alleged to have been received by the plaintiff while he was in the employ of the defendant and at work upon a defective machine, the first count of the declaration alleging as the cause of the injury negligence of a superintendent of the defendant, and the second count alleging as the cause a failure of the defendant to warn the plaintiff of the machine's defective character. Writ dated June 13, 1910.

In the Superior Court the case was tried before *Dubuque, J.*

The plaintiff testified in substance that he was a Lithuanian, forty years of age, and that he had lived in this country eleven years; that at the time of his injury he had worked for the defendant about a year upon a drilling machine; that previous to two o'clock in the afternoon of the day when he was injured he had not worked on a machine like the one on which he was injured, which was a machine for threading wrench jaws; that at that

time the second hand, who was in charge in the absence of the "boss" of the room where the defendant worked, directed the plaintiff to go to work on the threading machine; that he told the second hand that he did not know how to run that machine, and that the second hand told him to go home if he did not know how to run it; that the second hand did not show him how to run the machine, but that some of his fellow employees told him about oiling it and about the belts; that then he oiled it and, with successive oilings, ran it for two hours; that it was equipped with a shifting lever and that, when the lever was placed in an upright position, the machine would stop and remain stationary until the lever was shifted; that, the machine needing to be cleaned from oil, he placed the lever in an upright position, took some waste and was cleaning the machine when, without any one touching the lever, the machine started, the waste was caught on a cog and it and his hand were dragged into the cogs. There also was evidence that the machine had started automatically on several occasions before the injury to the plaintiff.

The judge denied a motion of the defendant to strike out certain testimony of one White, who until two weeks before the accident had been in the defendant's employ, to the effect that, about five weeks before the plaintiff's injury, he had seen the machine start automatically. The bill of exceptions also stated that, against the defendant's objection and exception, White was permitted to answer the questions, "Now, did you notice anything peculiar about this threading machine that you were working on. Yes or no?" and "What was it?" It also stated that the defendant excepted to the plaintiff's being allowed to ask one Budwites, a fellow servant, "Now did you ever notice anything wrong about that machine,—this threading machine?" to which he replied, "Yes," and then was asked, "Now what was that that was wrong?" In neither case did the bill of exceptions state what answer the witness made to the second question.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked the judge to rule as follows:

"1. Upon all the evidence, the plaintiff is not entitled to recover.

"2. Upon all the evidence, the plaintiff is not entitled to recover upon the first count of his declaration.

"3. Upon all the evidence, the plaintiff is not entitled to recover upon the second count of his declaration.

"4. If the jury believes the plaintiff's story that he was told to go home if he did not undertake the job of threading the wrench jaws, he cannot recover.

"5. The fact that the plaintiff consented to undertake the work of threading the wrench jaws under threat of dismissal will not save him from being held to have assumed the obvious risks of his undertaking.

"6. If the jury find that the plaintiff would not have been injured except for the fact that he attempted to oil or clean the threading machine, and if the jury further believes that the plaintiff was not directed by any one in authority for the defendant to oil or to clean the machine, the plaintiff cannot recover."

The portion of the charge which referred to the assumption of risk by the plaintiff was in substance as follows: "When a person goes into the service of another he assumes all the known visible or obvious risks of his employment; that is, he assumes the risk of getting his hands caught in a gear if the machinery is running. . . . On the other hand if he stopped the machine and while he was cleaning oil upon the machine or doing something about the machine, the machine started of itself and hurt him, . . . then he would be entitled to recover. . . .

"The law is that a machine that starts of itself without any explanation or justification for it, that gives the right to the jury to infer from the starting of the machine in and of itself that the machine is defective and that the defective condition of the machine was caused by the negligence of the defendant. Of course the defendant has a right to produce evidence and witnesses to explain the starting of the machine if it did start of itself."

The jury found for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions.

E. C. Stone, for the defendant, submitted a brief.

J. A. McGeough, for the plaintiff.

SHELDON, J. The jury could find that the plaintiff, while in the exercise of due care, was injured in consequence of the automatic starting of a machine upon which he had been set to work, at a time and under circumstances when it ought not to have started and would not have done so if it had been in proper repair

and condition. That, if there was nothing more in the case, entitled him to go to the jury and warranted a verdict in his favor. *Chiuccariello v. Campbell*, 210 Mass. 532. And see the cases there collected.

But the defendant contends that because the plaintiff, when ordered to go to work upon this machine, which according to some of the evidence had on previous occasions started automatically in the way now complained of, at first objected to doing so, but finally consented through fear of being discharged if he refused, he thereby accepted this more dangerous employment with its incidental risks, and thus assumed the risk of the very accident which happened to him, and so cannot recover therefor. *Leary v. Boston & Albany Railroad*, 139 Mass. 580. *Wescott v. New York & New England Railroad*, 153 Mass. 460. *Lamson v. American Axe & Tool Co.* 177 Mass. 144. *Burke v. Davis*, 191 Mass. 20. But the risks assumed by a servant who consents to work upon a dangerous machine under such circumstances are the risks of working upon that machine in the condition in which it ought to be or in which it obviously is or is known by him to be. He does not assume the risk of injury from the presence of a hidden defect in the machine which is not communicated to him and which without fault on his part he does not perceive or apprehend. *Ford v. Fitchburg Railroad*, 110 Mass. 240, 261. This principle was applied in *Martineau v. National Blank Book Co.* 166 Mass. 4, to the stronger case of a servant undertaking to examine and repair a machine which he knew to be out of order. It could be found also that the second hand who put the plaintiff to work upon this machine was a superintendent within the meaning of St. 1909, c. 514, § 127, cl. 2, and was negligent in failing to give the plaintiff any instruction or warning. It follows that the first four requests of the defendant rightly were refused.

The fifth request was given, certainly in substance. The jury were expressly told that the plaintiff assumed all the obvious risks of the employment, and what was added about the automatic starting was correct.

As to the sixth request, there was evidence that the defendant put the plaintiff to work upon a machine which had a tendency to start automatically and with which the plaintiff had no acquaintance. There was a duty upon the defendant to warn and instruct

him. If, as could be found, the defendant merely left him to learn from the men around him what to do, it cannot complain that he did what he thus learned. Moreover, there was evidence that it was the practice to oil the machine. The plaintiff so testified, and added, "You have to oil them first before you start to do anything." If oiling or cleaning by the plaintiff was necessarily incident to the work assigned to him, an express direction by some one in authority from the defendant to do so was not called for. *Manning v. Excelsior Laundry Co.* 189 Mass. 231. *Laplane v. Warren Cotton Mills*, 165 Mass. 487. Accordingly the defendant's sixth request rightly was refused.

The defendant was not harmed by what the judge said to the jury as to the plaintiff's having been told to wipe off the oil from the machine. The defendant's only argument as to this is that there was no evidence that any one in authority gave such a direction to the plaintiff. But as we have seen this was not necessary.

The testimony of the witness White as to the automatic starting of the machine on different occasions some weeks before the accident was not incompetent. It tended to show that the alleged defect had lasted so long before the accident that the defendant ought to have known of it and remedied it. Nor was it too remote as a matter of law. *Todd v. Rowley*, 8 Allen, 51. *Post v. Boston*, 141 Mass. 189, 193.

The exceptions to the other questions put to White and to those put to Budwites cannot be sustained. The court could find that the witnesses were competent to answer them, and the questions were not themselves improper. *Arnold v. Harrington Cutlery Co.* 189 Mass. 547. Moreover, the answers of the witnesses are not reported, and we cannot say that they were prejudicial to the defendant.

Exceptions overruled.

JOSEPH B. RUSSELL vs. FRANCES E. LILLY & another.

Suffolk. January 23, 1913. — January 29, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Trust, Construction. Devise and Legacy. Words, "Unmarried."

A testator, having living a wife and four daughters, one of whom was married, made a will creating a trust with provisions that the income should be paid to his wife during her life and that after her death \$500 should be given to the married daughter and \$500 each to such of the other three daughters as then should have become married or thereafter should marry, and that the income of the estate then "remaining" should be paid to such of the daughters "as shall be unmarried so long as they or she shall remain unmarried." Provision was made for the termination of the trust, first, "in case all my surviving daughters shall marry," or second, "upon the death of the last survivor of my daughters who may remain unmarried." *Held*, that no income was intended to be paid to a daughter after she became married, although she should become a widow, because the word "unmarried" was not intended to mean "having no husband living although once married."

Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning is intended.

RUGG, C. J. This is a bill in equity for instructions as to the meaning of a clause in the will of Joseph F. Ballister, who died in 1892, leaving a will dated in 1883. Most of the estate is given to a trustee to invest and pay the income to the widow during her life, and at her death to pay \$500 to his daughter Frances, who as appears by the will was then married, and \$500 to such of three unmarried daughters as then should have married or thereafter should marry, with the further provision now to be construed that "Thereafter my trustees shall pay all the net income of my estate then remaining, to such of my daughters as shall be unmarried, so long as they or she shall remain unmarried." The widow and two daughters have died, leaving a daughter, Frances E. Lilly, who is a widow, her husband having deceased in 1912, and Edith Ballister, a daughter, who has never married. The question is whether Frances E. Lilly is entitled to share in the income. There is no doubt that the word "unmarried" is susceptible of the two meanings "never having been married" and also "having no spouse living

although once married." It is not necessary to cite authorities in which the word has been given one or the other of these definitions. The sense in which it is employed by a testator depends upon the general frame of the will, the main purpose to be accomplished by it, the context in which it is found, and the light of the other provisions of the instrument.

This testator, at the time he executed this will, had a wife, one married daughter and three daughters who had never married. He created a trust out of his estate for their benefit. His primary object was to devote the income of his estate to the wife so long as she lived, and provision is made to that end. His secondary design was at her decease to make available gifts to married daughters. A pecuniary legacy is given to Mrs. Lilly if she should be living then, and a similar legacy to such of his other daughters as may have married before the death of his widow, and if any marries thereafter a like gift is provided. Finally, after making these payments, the net income of the trust fund is given to the "unmarried" daughters or daughter so long as they or she remain "unmarried." The trust is to terminate, first, "in case all my daughters surviving shall marry," or second, "upon the death of the last survivor of my daughters who may remain unmarried." This language is significantly expressive of the idea that only daughters unmarried at the time of his death who continued unmarried were intended. The clause last quoted plainly refers to a daughter who has never married. Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended. The natural signification of these words when used by a father of daughters, of whom one had married and others had not married, points to the exclusion of the one who had married from the designation "unmarried," even though she may become single by the death of her husband. In the light of all these circumstances, it is hard to believe that this testator thought of the contingency that a daughter previously married might be without a husband at the death of his wife. If this had been his intent he scarcely would have employed a word more aptly descriptive of one who had never married. The will as a whole seems to indicate a testamentary purpose to provide out of the income of the trust for those daughters

who continue unmarried, rather than to include those who, although once married, have become single.

Decree accordingly.

W. Rand, for the defendant Frances E. Lilly.

A. H. Russell, for the defendant Edith Ballister.

OSCAR H. NELSON *vs.* FRED W. PIPER, trustee, EUGENE W. STONE, administrator, claimant.

Essex. November 6, 1912. — January 31, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Bills and Notes, Indorsement, Rights of holder of equitable title. *Husband and Wife*. *Contract*, Implied in law. *Practice, Civil*, Interpleader.

Where the payee of a negotiable promissory note, given for a valuable consideration moving from a third person, indorses the note to the payee's wife and delivers it to the third person, the legal title to the note remains in the payee because the indorsement by the payee to his wife is void, but the third person becomes equitably entitled to the proceeds of the note and can enforce that right by an action in the name of the payee, even without his consent.

Where the payee of a promissory note delivers it to a third person for a valuable consideration but, by agreement with such third person, indorses it to the payee's wife, and thereafter the payee has no further interest in it and the third person holds it in good faith, such third person can maintain an action for money had and received against one to whom the maker of the note made a common law assignment for the benefit of his creditors and who admits that there is a dividend due to the person entitled to the proceeds of the note.

Where, in an action for money had and received, the defendant, acknowledging that he owes the money in question to the person entitled to the proceeds of a certain note, and averring that a person other than the plaintiff claims it, pays the money into court and under R. L. c. 173, § 37, causes such claimant to be made a party, the plaintiff, although he has no legal title to the proceeds of the note, can prevail if he is equitably entitled to such proceeds.

CONTRACT, with a declaration in two counts, the first count being for \$231.78, money had and received by the defendant to the plaintiff's use, and the second count alleging that one Louis F. Barton made a promissory note payable to the order of H. N. Stone for \$800; that H. N. Stone indorsed the note to Ella F. S.

Stone, and she indorsed it to the plaintiff; that Barton by a deed of trust conveyed all his real and personal property to the defendant in trust for the benefit of his creditors; that the plaintiff became a party to the assignment; that the dividends due the creditors under the assignment had been determined, that due to the plaintiff being \$231.78; and that the plaintiff, although demanding his dividend, had been refused by the defendant. Writ in the Newburyport Police Court dated September 19, 1910.

Under the circumstances stated in the opinion, the defendant paid into court the amount in controversy and the administrator of the estate of H. N. Stone was made a party defendant as a claimant for the fund.

On appeal to the Superior Court the case was tried before *Raymond, J.*

The common law assignment of Stone to the defendant provided that "No creditor shall be deemed a party to this agreement or entitled to the benefits of its provisions who fails to assent in writing to the terms of the same within thirty days from this date" with certain exceptions not material.

Other material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the claimant; and the plaintiff alleged exceptions.

E. Foss, for the plaintiff.

E. E. Crawshaw, for the claimant.

DE COURCY, J. The plaintiff, as holder of a promissory note made by one Barton, brought this action against the defendant Piper, who is trustee under a common law assignment made by Barton for the benefit of creditors, to recover the sum payable as a dividend on the note. It is to be noted that the action is not over the note itself. The trustee admitted his liability for the dividend, which he paid into court, but interpleaded the administrator of the payee named in the note, who had made claim for the money. Thereupon the administrator was admitted as a party, and the controversy proceeded between the plaintiff and the claimant. At the trial in the Superior Court the judge ruled that the plaintiff could not recover, and the correctness of that ruling is now before us.

It appeared in evidence that the payee, H. N. Stone, had deliv-

ered the note to the plaintiff, but by agreement between them he had indorsed it to his wife, Ella F. S. Stone. Clearly this indorsement did not transfer the legal title to her, but it remained in the husband, and after his death passed to the administrator of his estate, the present claimant. *National Bank of the Republic v. Delano*, 185 Mass. 424. *National Granite Bank v. Whicher*, 173 Mass. 517.

There was evidence, however, which would warrant a finding that the equitable title to the note is in the plaintiff, and that he is entitled to the dividend thereon. It appeared that the payee, H. N. Stone, gave the note to the plaintiff in payment for legal services, that the latter received and has retained the instrument in good faith, and that the indorsement was made to Mrs. Stone in order that the plaintiff should not appear as a creditor in the bankruptcy proceedings that he was about to institute against the maker Barton. Apparently at no time thereafter did Stone have any interest in the note or right to its possession as against the plaintiff. *Jones v. Witter*, 13 Mass. 304. *Crain v. Paine*, 4 Cush. 483. *Norton v. Piscataqua Fire & Marine Ins. Co.* 111 Mass. 532. On these facts the rights of the parties were the same as they would be if Stone had not written any indorsement upon the note; and the plaintiff might have sued thereon in the name of the administrator, with or without the latter's consent. *Boutelle v. Carpenter*, 182 Mass. 417. *Troeder v. Hyams*, 153 Mass. 536, 540.

The plaintiff's equitable title can be fully enforced under the pleadings in the case. If he was entitled in equity and good conscience to the dividend, he may recover the same under the count for money had and received. *Wiseman v. Lyman*, 7 Mass. 286. *Bouve v. Cottle*, 143 Mass. 310, 314. And now that the money is in the custody of the court under the statute, the rights of the plaintiff and the claimant are to be determined as in a suit of interpleader, and the one who has the equitable interest in the fund is entitled to prevail. R. L. c. 173, § 37. *Underwood v. Boston Five Cents Savings Bank*, 141 Mass. 305. *Dixon v. National Life Ins. Co.* 168 Mass. 48. *Brierly v. Equitable Aid Union*, 170 Mass. 218.

The fact that neither of these parties assented in writing to the Barton assignment becomes immaterial in consequence of the

trustee's position of stakeholder and his admission that he is liable for the dividend to either the plaintiff or the claimant.

As the court erred in directing a verdict for the claimant, the entry must be

Exceptions sustained.

BENJAMIN WILLIAMS vs. JOHN W. KNIBBS.

SAME vs. SAME.

Worcester. November 20, 1912. — January 31, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Construction, Termination. Partnership.

In an action of contract it appeared that the plaintiff was an inventor and had made a contract in writing with the defendant, reciting that he had assigned to the defendant a one half interest in an invention for which he had made an application for letters patent, and providing that neither party to the agreement should, without the consent of the other, assign or encumber his interest, that the profits from the invention or the sales of the invented article should be equally divided, that the defendant should pay the plaintiff "a salary of \$12 per week and . . . all expenses required for the prosecution and procuring of patents thereon in this and foreign countries, the said payments made being charged up against the profits of the concern before said profits are divided." At the trial there was no evidence that the defendant had paid the expenses of procuring a patent. There was evidence tending to show that no patent ever had been issued. *Held*, that it could not be ruled that the salary was to be paid to the plaintiff only for a reasonable time, because it was the manifest intention of the parties that the agreement should remain in force until the expenses of procuring the patent were paid by the defendant. *Held, also*, that under the contract the parties did not become partners, and that, irrespective of whether there were profits or not, the defendant was bound to pay the salary to the plaintiff so long as the contract was in force.

TWO ACTIONS OF CONTRACT for amounts alleged to be due as salary under a contract in writing set out in substance below. Writs dated respectively July 8 and August 20, 1910.

The contract was dated February 3, 1910, and was in substance as follows:

"That whereas the said Benjamin Williams is the inventor of a Mop Wringer on which he has filed application for United States letters-patent on or about the 24th day of May, 1909, Serial No.

497,997 and has this day executed an assignment of an undivided one-half interest therein to the said John W. Knibbs, now, therefore, the parties have agreed and do hereby agree together as follows:

"1. That neither party shall, without notice to and approval and consent of the other, sell, assign, transfer or in any manner encumber the invention, interest in or the joint title to the said invention, or the applications or letters-patent applied for or to be obtained thereon in this or any foreign country, or manufacture or sell the invention as an article of merchandise, or grant any licenses or privileges under the patent or patents thereon in this or foreign countries when issued on this invention, or any other invention that may be made in wringers by said Benjamin Williams.

"2. It is further agreed that all profits derived from the invention or the sale of the Mop Wringers aforesaid, shall be divided equally between the respective parties hereto.

"3. It is hereby further agreed that said John W. Knibbs shall pay said Benjamin Williams a salary of twelve dollars per week and shall pay all expenses required for the prosecution and procuring of patents thereon in this and foreign countries, the said payments made being charged up against the profits of the concern before said profits are divided, in accordance with section 2."

In the Superior Court the case was tried before *Lawton, J.* At the close of the evidence the defendant requested that the jury be instructed as follows:

"1. There being no time expressly stated in the contract during which the twelve dollars per week were to be paid by the plaintiff, the law implies an obligation only to pay that sum for a reasonable length of time, which time is to be determined by the jury taking into consideration all the facts presented."

The request was denied. The jury found for the plaintiff in the first action in the sum of \$266.20, and in the second action in the sum of \$78.84. The defendant moved for a new trial, "alleging, among other things, that the verdicts were against the law and specifying that the agreement sued on is a partnership agreement and that no action of law can be maintained thereon, and further, that the agreement constituted the parties partners at will and the defendant had a right to terminate the same at will." The

judge "ruled otherwise," denied the motion, and reported the case for determination by this court, stating that, if no error was made in the rulings at the trial or on the motion for a new trial the verdicts were to stand; otherwise, either judgment was to be entered for the defendant or a new trial was to be ordered as justice might require.

The cases were submitted on briefs.

C. E. Tupper & G. H. Richardson, for the plaintiff.

W. Thayer, G. A. Drury & F. A. Walker, for the defendant.

SHELDON, J. The defendant's first request for instructions rightly was refused. The agreement declared on recited that the plaintiff had filed an application for letters patent upon an invention, and had assigned a half interest therein to the defendant. It contains a stipulation that the defendant shall pay "all expenses required for the prosecution and procuring" of patents "in this and foreign countries." It does not appear, and the defendant does not seem to have claimed, that he had paid the expenses of procuring the patent which had been applied for; and there was affirmative evidence that this patent never had been issued. It may be that the defendant could not be required to pay the expenses of obtaining or attempting to obtain patents in foreign countries unless both parties should desire to apply therefor; but the agreement cannot be construed to give him the right to terminate it before he has complied with his promise to defray the expenses of procuring the patent for which application was then pending. The agreement must have been intended to remain in force until he should have complied with this stipulation or such performance should without his default have become impossible. That was the manifest intention of the parties. *Hubbell v. Buhler*, 43 Hun, 82. *Wright v. C. S. Graves Land Co.* 100 Wis. 269. The question whether since the agreement is silent as to the term of its duration after the patent shall have been paid for and taken out, it should be considered after that event as remaining in force only for a reasonable time, or as terminable at the will of either party as a partnership would be, is not raised upon this report, and we express no opinion upon it. See *Carnig v. Carr*, 167 Mass. 544, 547; *Rotch v. French*, 176 Mass. 1; *Tilton v. Whittemore*, 202 Mass. 39; *St. Paul Plow Works v. Starling*, 140 U. S. 184.

There was no error in the ruling made on the motion for a new

trial. The parties did not become partners as between themselves. Their situation resembled rather that of ship-owners. They owned together, in equal shares, the invention and the patent of which they contemplated the issue. They regarded themselves as joint owners, and covenanted with each other accordingly. *Thorndike v. DeWolf*, 6 Pick. 120. *French v. Price*, 24 Pick. 13. *Buck v. Dowley*, 16 Gray, 555. *Meserve v. Andrews*, 104 Mass. 360. *Mayo v. Moritz*, 151 Mass. 181.

The defendant made an absolute agreement to pay to the plaintiff the sum of \$12 per week. This he is held to pay in any event during the continuance of the agreement. It is not merely a charge upon profits, although if profits should be realized it is to be deducted from the amount thereof before making any division. It follows that the plaintiff is entitled to maintain these actions for the amount of his stipulated weekly salary. There is authority for the position that he would be so entitled even if the relation between these parties were that of partners. *Williams v. Henshaw*, 11 Pick. 79, 83, 84. *Ryder v. Wilcox*, 103 Mass. 24, 29, 30. *Costelo v. Crowell*, 134 Mass. 280, 286. *Paine v. Thacher*, 25 Wend. 450. *Robinson v. Green*, 5 Har. (Del.) 115.

What we have said disposes of all the questions that have been argued by the defendant. In each case the order must be

Judgment on the verdict.

JACOB MANHEIM vs. WILLIAM S. WOODS & others.

Bristol. October 28, 1912. — February 3, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DE COURCY, JJ.

Attorney at Law. Evidence, Presumptions and burden of proof. Equity Pleading and Practice, Appeal.

On an appeal by the plaintiff from a decree dismissing with costs a bill in equity against an attorney at law seeking that an absolute assignment to the defendant of a policy of insurance upon the plaintiff's life be declared to have been an assignment for the purpose of securing a loan by the defendant to the plaintiff, and praying for an accounting and a redemption of the policy, the report of the evidence showed that the testimony at the hearing was voluminous and that the defendant was a witness. The judge found that the defendant had sus-

tained the burden of proving that the assignment of the policy not only was absolute, but that it had been fairly and honestly consummated. *Held*, that, when modified by the omission of costs, the decree dismissing the bill should be affirmed, because the record, while revealing circumstances which had a strong tendency to warrant different conclusions from those reached by the judge, did not show that his findings were plainly wrong.

BILL IN EQUITY, filed in the Superior Court on May 17, 1911, and afterwards amended by the filing of a substitute bill, against William S. Woods, Clinton F. Macomber, Harold F. Hathaway and the Mutual Life Insurance Company of New York.

The substitute bill alleged that the plaintiff's life was insured by the defendant insurance company for \$10,000; that the plaintiff after the death of his wife employed the defendant Woods to contest her will, which practically excluded him from sharing in property which had stood in her name but had been accumulated by his efforts.

The second paragraph of the substitute bill contained among others the following allegations: That the plaintiff, acting under the advice of Woods, and while still weak and sick, consented to a settlement of his claims upon the property disposed of by his wife's will and left by her to another man to the exclusion of the plaintiff, under which settlement the plaintiff received about \$9,000; but that before receiving that amount the plaintiff, under the advice of the defendant Woods, borrowed from the defendant corporation the sum of \$2,300 upon the policy of insurance as security, and delivered the policy to the defendant company to hold as security for the loan; that the plaintiff was informed and alleged that under the terms of the policy he would be entitled to receive either \$4,300 in cash, or a paid-up policy for \$10,000 after payment of the loan, if he lived until September 27, 1914; that in May, 1909, the defendant Woods, although well knowing the value of the policy, concealed the same from the plaintiff, and falsely represented to the plaintiff that the policy was of much less than its real value; and knowing the plaintiff's financial condition the defendant Woods further falsely represented to the plaintiff that he would be unable to pay the annual premiums necessary to keep the policy in force, together with the interest on the loan of \$2,300, and thereby on or about May 22, 1909, fraudulently induced the plaintiff to make an assignment of the policy to him; that the assignment was made for the purpose of securing the

defendant Woods for such sums as he might pay to the plaintiff, or on his account, either as interest on the loan, or for premiums due to the company, or for money to be advanced from time to time to the plaintiff; and it was distinctly stipulated and agreed that if the plaintiff at any time desired to have the assignment returned and cancelled by the defendant Woods, he should be entitled to such return and cancellation upon repaying to Woods the amount due to him on account of such advancements, with interest thereon; and that the plaintiff was informed and alleged that some paper was drawn up and signed by Woods with reference to the assignment, but that he had neither the original nor a copy of such paper, the same having been retained by Woods.

Paragraph three of the substitute bill was as follows: "The defendant Woods now pretends that the said assignment was absolute, and in order to prevent the plaintiff from having the same returned and cancelled, on October 26th, 1909, made a further assignment of the said policy to the defendants Hathaway and Macomber, said Hathaway being an attorney at law, having an office in Taunton, on the same floor with the defendant Woods, the said Macomber being an associate or client of the said Hathaway. The plaintiff is informed, believes, and therefore alleges that neither the said Hathaway nor the said Macomber paid anything, or gave any valuable consideration for the said assignment, and that both of them had notice of the terms upon which the assignment from the plaintiff to Woods was secured; and the plaintiff further says that he never gave his consent to the said assignment by Woods, and although the plaintiff is now informed that his name has been signed as evidence of such consent, such signature was not made by the plaintiff, and is a forgery."

The bill further alleged a tender by the plaintiff of an amount due from him to the defendant Woods, and the prayers of the bill were for an accounting, for injunctions restraining the defendants from conduct with the policy which would be in contravention of the plaintiff's alleged rights, and for general relief.

Before the trial of the case, the plaintiff died and Abraham Summerfield, the executor of his will, was admitted as plaintiff in his stead. Subsequently the beneficiary named in the insurance policy above described, Mattie Summerfield, was admitted to prosecute the case as plaintiff.

The case was heard by *Pierce, J.*, a commissioner being appointed under Equity Rule 35 to take the evidence. The commissioner's report of the testimony occupied one hundred and forty-five pages of the printed record. The material portions of the evidence are described in the opinion. The judge filed the following memorandum of his findings:

"1. The defendant William S. Woods was retained as attorney by Jacob Manheim to contest the will of the wife of the said Manheim and acted as such attorney throughout the proceedings.

"2. The defendant Woods served his client with fidelity throughout the proceedings affecting the said will and carried through for him an advantageous settlement.

"3. The defendant Woods retained as advisory counsel Arthur M. Alger of Taunton and paid the said Alger out of his fee received in the adjustment of the said case.

"4. The settlement carried through by the said Woods was a just and fair one and the fees charged for professional services were reasonable and proper and were agreed to by Jacob Manheim and were satisfactory to him at the time.

"5. Jacob Manheim was greatly incensed by the provisions of his wife's will practically excluding him from participation in her estate and was bitterly resentful of its provisions.

"6. Shortly after the death of his wife Jacob Manheim procured a loan of some \$2,300 upon the security of his life insurance policy in the defendant company, acting through the defendant Woods as his attorney and agent.

"7. Prior to the procurement of the above mentioned loan the facts in regard to the value of said policy were known to the said Manheim and especially that he could procure a larger sum by way of loan than he could by surrendering the policy and receiving its cash surrender value.

"8. Subsequent to the procurement of the said loan by Jacob Manheim upon his said policy, he tried to dispose of the same to a number of persons throughout Taunton, and was especially anxious to sell the policy to the defendant Woods, with whose family he was on familiar terms and whom he held in high esteem.

"9. Jacob Manheim sold his right, title and interest in said policy to the defendant Woods in May, 1909, being fully advised

in regard to the terms of the sale, as set forth in the papers, and agreeing thereto.

"10. There was no concealment of any material fact from the said Jacob Manheim by the defendant Woods in connection with the sale of said policy, nor any false representations in regard to the value of the policy or in regard to the plaintiff's ability to pay annual premiums thereon, necessary to keep the policy in force, as set forth in paragraph 2 of the plaintiff's bill, nor did the defendant Woods fraudulently induce the said Manheim to make any assignment of said policy.

"11. The assignment of said policy to the defendant Woods was not for the purpose of securing him for such sums as he might pay Jacob Manheim or on his account, and it was not stipulated and agreed at any time that Manheim might re-take the policy and cancel the assignment upon paying the defendant Woods his advances, with interest.

"12. There was no collateral paper signed by William S. Woods in reference to the assignment of the policy from Jacob Manheim to him, but the assignment, together with the agreement of William S. Woods to pay the plaintiff as set forth in the agreement of said Woods under date of May 22, 1909, represents the whole transaction.

"13. After the papers assigning the policy to William S. Woods were executed, the defendant Woods either paid or caused to be paid to the company and to Jacob Manheim all sums of money which were to be paid to the company or to Manheim under the terms of the agreement of May 22, 1909, up to the time of the death of the said Manheim, and in all other respects carried out his obligation thereunder.

"14. The assignment of the said policy by Woods to Hathaway and Macomber, in October, 1909, was made in the ordinary course of business, in good faith, for \$500, paid by Hathaway and Macomber without notice of any claim or demands, legal or equitable, by Jacob Manheim or anybody representing him.

"15. Due notice of the assignment to Woods and the subsequent assignment to Hathaway and Macomber was given to the defendant company and received by it."

A decree was made dismissing the bill with costs. The plaintiff appealed.

W. D. Turner, (J. S. Spencer with him,) for the plaintiff.

H. F. Hathaway, for the defendant Woods.

H. W. Ogden, for the defendants Macomber and Hathaway.

BRALEY, J. The original plaintiff, Jacob Manheim, after bringing suit, died testate, and it was prosecuted by his executor until the beneficiary who claims the proceeds of the policy was substituted as plaintiff. It will be necessary to a clear understanding of the controversy to refer to the parties as they stood at the filing of the bill, for the right to relief depends upon the validity of the transfer by Manheim to the defendant Woods.

The plaintiff having been dissatisfied with the provisions of his wife's will, which had been offered for probate, employed the defendant, an attorney at law, as his legal adviser to protect his interests in the estate, though the evidence seems to warrant the inference that he did not desire an actual contest. By negotiations with the principal legatee the defendant effected a compromise whereby upon receiving a substantial amount of money the plaintiff released all rights in the estate and withdrew his opposition. During the proceedings for a settlement covering practically four months the plaintiff appears to have needed pecuniary assistance, and consulted the defendant. The defendant testified that he appeared to have the full confidence of the plaintiff, and the fiduciary relation of attorney and client plainly existed, which upon the defendant's own evidence did not terminate until some time after the transaction in question. This relation of trust and confidence requires a court of equity to scrutinize with the greatest care business dealings between them. The transfer of property from a client to his attorney is not to be viewed as a mere commercial transaction where ordinarily each must beware of the trading ability of the other, and the advantage would remain with the more skilful bargainer. As was said in *Manning v. Hayden*, 5 Sawyer, 360, 381, "this rule is alike necessary to preserve the dignity and integrity of the legal profession, and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate, because the injury to the client does not fully appear, or a positive intention on the part of the attorney to gain an advantage is not shown." In the application of the rule the burden rested on the defendant of proving that the assignment of the policy to him not only was absolute, but had been

fairly and honestly consummated. *Hill v. Hall*, 191 Mass. 253. *Kelly v. Allin*, 212 Mass. 327. *Dunn v. Record*, 63 Maine, 17. *Dunn v. Dunn*, 15 Stew. 431. *Nesbit v. Lockman*, 34 N. Y. 167, 171, 172. *Manhattan Cloak & Suit Co. v. Dodge*, 120 Ind. 1, 3. *Newcomb v. Brooks*, 16 W. Va. 32. *Willin v. Burdette*, 172 Ill. 117. *Rogers v. R. E. Lee Mining Co.* 9 Fed. Rep. 721, 724, note. *Carter v. Palmer*, 8 Cl. & F. 657, 706. *Wright v. Proud*, 13 Ves. 136. *Story Eq. Jur.* (13th ed.) § 310.

By its terms the policy on the plaintiff's life for \$10,000 was payable to his wife if she survived, but if she predeceased him, his executors or administrators, or whomsoever he might designate as beneficiaries, were to receive the insurance. Acting at his request the defendant obtained from the company on April 13, 1909, a loan for the plaintiff on the policy of \$2,343, being less than the "cash surrender value" at that date. The defendant knew if the policy remained in force it would mature five years later when if surrendered its value in money would be approximately \$8,159.70, and moreover he knew that upon the decease of the insured the full insurance could be collected. The plaintiff assigned the policy to the defendant on May 22, 1909, and, the company having accepted the assignment, the defendant had acquired the right to this amount at least, if he continued the payment of the annual premium of \$440, the yearly interest of \$116 on the loan, and paid the loan at maturity of the policy. The premium and interest were payable semiannually in advance, and the loan could have been discharged when the premium became due. But if the evidence leaves no uncertainty as to the defendant's knowledge of the plaintiff's needs, the value of the policy, and the profit reasonably to be anticipated, it also shows that the plaintiff had endeavored unsuccessfully to dispose of the policy before soliciting his attorney to purchase. The entire consideration as recited in the assignment included an agreement to pay to the plaintiff an annuity for life of \$300 in equal monthly payments, and the likelihood of the plaintiff's death within less than twenty-five months does not seem to have been within the contemplation of the parties. From his declarations put in evidence under R. L. c. 175, § 66, and subsequent correspondence, the plaintiff intended the transfer to be conditional, and upon repayment of all advancements with interest the assignment was to be cancelled, and the

policy returned. It is stated in the bill, and the declarant's evidence tends to support the averments, that the agreement to pay the annuity was to be reduced to writing in an independent instrument, and duly executed. The defendant while not denying the oral promise testified that nothing further was done. If the transaction had been between strangers it is hardly conceivable, that he would have advised his client to rely on the assignment, which by the terms of the policy must be transmitted to and retained by the company, as satisfactory evidence of a contract for the payment of an annuity which might run for years and extend beyond the life of the promisor. *Cahill v. Maryland Life Ins. Co.* 90 Md. 333. Compare *Berry v. Doremus*, 1 Vroom, 399. The consideration shows such inadequacy as to make the contract decidedly disadvantageous to the plaintiff if he could have carried the policy and had not been in want of ready money. He was, however, of mature age and of much business experience. The inference would not be unwarranted that he was afforded ample opportunity to consider the contract and did not act hastily.

It also appears from the testimony of witnesses apparently disinterested, that soon after it had been completed he expressed himself as being satisfied with the terms of the transaction.

Although falling short of the definiteness which would have made his narrative of what he claimed had occurred more consistent and satisfactory, yet if the defendant, who was a witness in his own behalf, is believed, the parties dealt on an equal footing. No material facts were suppressed, or misleading representations were made. Where fraudulent conduct is charged the appearance of the party implicated and his manner of giving evidence are of great importance in passing upon his credibility. The defendant's hesitation in the recollection of details, and his lack of certainty, where certainty even if not imperative was most desirable, may have been attributable to an honest failure of memory rather than to an intention to withhold information which might have discredited him and imperilled his professional standing. The judge of the trial court who saw and heard him accepted his evidence as convincing, or he could not have made the ninth, tenth and eleventh findings found in the memorandum of decision.

A careful examination of the record, while revealing circumstances which have a very strong tendency to warrant a different

result, does not show that the findings were plainly wrong, and accordingly they must stand. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 459.

The assignment having been absolute and not conditional the subsequent sale and transfer of the policy by Woods to the defendants Hathaway and Macomber need not be considered. If the assignor is exonerated, their title is not open to inquiry. *King v. Cram*, 185 Mass. 103, 104. *Stewart v. Joyce*, 201 Mass. 301. But the decree dismissing the bill must be modified by the omission of costs, and when so modified it is affirmed.

Ordered accordingly.

MAGGIE ROLIKATIS vs. CHARLES W. LOVETT.

Essex. November 6, 1912. — February 3, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Attorney at Law. Trust, Constructive. *Equity Jurisdiction*, For an accounting, Laches. *Interest.*

Where a woman client of an attorney at law, reposing trust and confidence in such attorney, employs him to attend a foreclosure sale of real estate and to purchase the property in her name to protect her interests, and the attorney, instead of doing this, causes the property to be purchased at the sale for his own benefit and afterwards sells it at a profit, for which he refuses to account to his client, he holds the proceeds of the sale subject to a constructive trust for the benefit of his client, who can maintain against him a suit in equity for an accounting.

In a suit in equity by a woman against an attorney at law for an accounting for the income and profits derived from certain real estate, which the defendant wrongfully had bought for his own benefit at a foreclosure sale when he had been employed by the plaintiff to buy it for her in order to protect her interests, where it appears that the bill was not filed until a year and nine months after the defendant's purchase of the real estate, but that the plaintiff was of foreign birth and unacquainted with the English language, that during the time of such delay she had implicit faith in the defendant's honesty of purpose and believed from his conduct and statements that he had acted in her behalf, and that when the defendant refused to recognize her rights and claimed the property as his own she brought the suit, *it seems* that such lapse of time would not be a bar to the bill, even if the defense of laches were pleaded and therefore were open to the defendant, which here it was not.

In a suit in equity by a woman against an attorney at law for an accounting for the income and profits derived from certain real estate, which when employed by the plaintiff as his client to purchase for her he wrongfully had

purchased for his own benefit, the defendant is not entitled in such accounting to be allowed interest on the amount of the price paid by him for the real estate, because, having committed wilfully a breach of trust to the disadvantage of the plaintiff, he should not be permitted to receive compensation in the form of interest.

BILL IN EQUITY, filed in the Superior Court on March 21, 1910, alleging that in June, 1908, the husband of the plaintiff was the owner of a certain parcel of land with a dwelling house thereon on Elmwood Avenue in Lynn, then of the value of \$2,000 and subject to a mortgage for \$1,100; that, the plaintiff's husband having deserted her, the assignee of the mortgage instituted foreclosure proceedings and the plaintiff retained the defendant, who was an attorney at law, to attend the foreclosure sale and to purchase the property in her name, which he agreed to do; that in June, 1908, the defendant attended the sale and informed the plaintiff that he had bought the property for her; and that the plaintiff at the defendant's request allowed him to collect the rents from the property and pay for certain repairs thereon and to pay interest, taxes and other charges against the property; that thereafter from time to time the plaintiff demanded an accounting and that at each such request the defendant assured her that he was protecting her interests and that in proper season he would account to her fully; that in February, 1910, the plaintiff demanded an accounting, and that the defendant then for the first time informed her that the property did not stand in her name and declared that she had no interest in it and refused to account to the plaintiff for the rents and profits; that the plaintiff was informed and believed that the defendant, instead of having the title to the property taken in the name of the plaintiff, had it taken in the name of one Jordan, a clerk or employee of the defendant, who held it solely for the benefit of the defendant, and that on January 18, 1910, the defendant had caused the property to be conveyed by Jordan to one Ryback, from whom the defendant received in payment certain cash and a second mortgage, which the plaintiff averred on information and belief to amount together to \$2,000. The plaintiff further averred her willingness to pay to the defendant any sum which might be due to him to entitle her to obtain the relief sought, and prayed that the defendant should be enjoined from assigning or disposing of

the mortgage from Ryback and that he should be ordered to assign such mortgage to the plaintiff; that the defendant should be ordered to account to the plaintiff for all rents, income and profits received by the defendant or his agent from the property in question and to pay to the plaintiff all moneys due upon such accounting; and for further relief.

The case was referred to Charles Neal Barney, Esquire, as master. The master's report contained the following summary of his findings:

"In view of the foregoing facts, I find on the whole case that the purchase at the foreclosure, by the defendant Lovett for himself, of the property which is the subject matter of this action was a violation of his fiduciary relation to the plaintiff and results in equity in such a constructive trust as entitles the plaintiff to an accounting for the profit that may have accrued to the defendant in the transaction.

"I find on such accounting that the defendant should be charged with \$1,173.61 (being the amount received by him from the increase in the mortgage, from the gross rent receipts, and from the sale of the equity in January, 1910); and should be allowed \$773.39 (being the purchase price of the equity and the disbursements on the property between June 1908 and February 1910 as hereinbefore set forth), together with \$122 (being the amount found due him for his services in connection with the management thereof during said period). That is to say, I find upon the whole accounting that the defendant should pay to the plaintiff the sum of two hundred seventy-eight dollars and twenty-two cents (\$278.22)."

The case was heard by *Dana, J.*, upon the defendant's exceptions to the master's report. At the hearing the defendant asked the judge to make certain rulings. The judge overruled the exceptions to the master's report, and refused to make the rulings requested by the defendant. The defendant alleged exceptions, raising the questions which are stated in the opinion.

The case was submitted on briefs.

N. D. A. Clarke, for the defendant.

W. H. Niles, for the plaintiff.

BRALEY, J. The evidence not having been reported, the master's findings of fact are conclusive, and it follows that, when the

defendant, an attorney at law, acquired the property which is the subject of this suit, the fiduciary relation of attorney and client existed between the parties. It further appears that his attendance at the sale was upon an understanding and arrangement that he should safeguard the plaintiff's interests, and bid off the property for her, and the master unhesitatingly finds that instead he took advantage of the opportunity to obtain the title for himself. A clear breach of the trust and confidence which she had reposed in him is shown by the report. The extent and nature of this relation and the scrupulous care which should be exercised by the court, when the validity of transactions where the attorney acquires the property of his client, or property which he has engaged to procure for his client, are under review, have been so recently pointed out that further discussion is unnecessary. *Hill v. Hall*, 191 Mass. 253. *Kelly v. Allin*, 212 Mass. 327. *Manheim v. Woods*, *ante*, 537.

It is true that the plaintiff, although prepared to advance the purchase price, did not do so, and consequently there is no resulting trust. *Bourke v. Callanan*, 160 Mass. 195. But, whenever an attorney at law, who is retained or employed to purchase, buys the property indirectly on his own account without the client's assent, as in the case at bar, a constructive trust arises, and he will be held to be a trustee at the election of his client, who is entitled to the benefit of the transaction. *Hawkes v. Lackey*, 207 Mass. 424, where the cases are collected. *Manheim v. Woods*, *ante*, 537.

The defense of laches, not having been pleaded, is not open. *Stewart v. Joyce*, 201 Mass. 301. But, if pleaded, we should hesitate long before holding that the delay of less than two years, where the plaintiff is shown to have been of foreign birth and unacquainted with our language, and during the time had implicit faith in the defendant's singleness of purpose and believed from his conduct and statements that he had acted in her behalf until he refused to recognize her rights and claimed the property as his own, when thereupon she brought suit, should bar relief in a court of conscience. *Sawyer v. Cook*, 188 Mass. 163.

Nor did the master or the judge err in refusing to allow the defendant interest on the purchase price. It is to be presumed that he knew the law, and, having acted to the disadvantage of the plaintiff, he should not be permitted to receive compensation

in the form of interest. *Morse v. Hill*, 136 Mass. 60. *Hayes v. Hall*, 188 Mass. 510. *Milwaukee & Minnesota Railroad v. Soutter*, 13 Wall. 517.

The exception to the admission of evidence, not having been argued, calls for no comment, and, finding no error of law in the refusals to rule as requested or in the master's report, the exceptions are overruled.

So ordered.

BAR ASSOCIATION OF THE CITY OF BOSTON vs. PETER
J. CASEY.

Suffolk. December 13, 1912. — February 4, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY & SHELDON, JJ.

Attorney at Law. Disbarment Proceedings. Constitutional Law.

The decision of this court in *Boston Bar Association v. Casey*, 211 Mass. 187, in regard to the nature of a proceeding for disbarment, the relation to such a petition of an incorporated bar association as the petitioner, and the qualification of the judges of the Superior Court to sit in the case as affected by their membership in such association, here was affirmed.

The decisions of this court in *Boston Bar Association v. Casey* at previous stages of that case as reported in 196 Mass. 100 and 204 Mass. 331, relating to the nature of the charges against the respondent and the questions whether upon the allegations of the petition and upon the evidence the order of disbarment was made legally and properly here were affirmed, and it also was decided that certain arguments urged by the respondent were disposed of by such previous decisions and were not open to him.

R. L. c. 165, § 44, authorizing the removal of an attorney at law for deceit, malpractice or other gross misconduct is constitutional.

In overruling exceptions of a respondent in a disbarment proceeding and affirming orders appealed from by him, where the order of disbarment had been made more than six and a half years previously upon a simple charge that the respondent wrongfully had kept for himself money belonging to his client, and the respondent, after appealing, had filed successively numerous motions, many of them of the most technical character, and where in disposing of the questions raised by him three previous decisions of this court had been made, it was said that the court were forced to the conclusion that the motions of the respondent then before them were made for the purpose of delay in a proceeding of a kind in which it was especially important that the truth should be ascertained and declared speedily.

HAMMOND, J. The petition for the disbarment of the respondent alleged among other things that he "has not observed the require-

ments of his said oath of office" and "has not continued to be and is not of good moral character, and has been guilty of deceit, malpractice and other gross misconduct."

After a full hearing the judge found that the respondent had "fraudulently appropriated to his own use a considerable sum of money belonging to his client," and ordered that he be disbarred. The respondent appealed from the order of disbarment, which appeal seems not to have been prosecuted, but instead thereof, at his request, the presiding judge reported the case to this court upon the question "whether the order of disbarment was justified as a matter of law." Upon this report it was adjudged by this court that the findings were warranted by the evidence. In giving the opinion of the court Morton, J., further says: "There can be no doubt that the fraudulent misappropriation by the respondent of money belonging to his client constituted a violation of his oath of office, and rendered him guilty of malpractice and justified as matter of law his disbarment. We do not mean to intimate by anything that we have said that Bruce [the client] could not legally have agreed with the respondent that he should have the \$800 for such services as he might render, however much in excess that sum would be of a reasonable compensation for what was done. But the presiding judge found as a fact that no such agreement was entered into, but that the money was received by the respondent as attorney for Bruce, and that the respondent fraudulently appropriated to his own use his client's money, and it was on this ground that the disbarment was ordered."

The opinion further proceeds as follows: "The respondent contends that there was a variance between the allegations of the petition and the proof. No question, however, of variance seems to have been raised at the hearing, and it was, of course, too late to raise it for the first time at the argument of the exceptions in this court. But while the particulars in respect to the matter relied on were not stated with entire accuracy in all respects, it clearly appears, we think, that the respondent was fully informed as to the substance of the charge against him and had the fullest opportunity to present such facts and evidence bearing upon it as he desired. We discover nothing prejudicial to his rights in the way in which the proceedings were conducted. *Boston Bar Association v. Greenwood*, 168 Mass. 169. The petition was

properly presented by the bar association." *Boston Bar Association v. Casey*, 196 Mass. 100, 110, 111.

After the rescript affirming the order of disbarment was sent down, and before judgment, the respondent filed in the Superior Court (1) a motion that he be allowed "further time for filing a motion for a new trial" "for the reason that there has been a mistake in law in the finding of facts by the court and rendition therein and for the reason of newly discovered evidence," and "upon questions of law existing before the finding of the court against the respondent as well as since;" (2) a motion to "vacate the order or judgment of disbarment of the respondent" upon the grounds (a) that the judgment "was premature and without authority of law;" (b) that after the findings made by the court on March 10, 1896, there was no hearing upon the question of sentence or judgment before the same was made and ordered; (c) that there was a material variance between the allegations of the petition and the findings of the court against the respondent affecting the jurisdiction and authority of the court to make the findings without amendment to the petition; (d) that the "preliminary findings of fact and the general finding of fact adverse to the respondent cannot be identified with any one or all of the allegations in the petition;" (e) that the respondent was entitled as a matter of right to a separate and formal hearing on the question of the final sentence or judgment, which was not given him; (f) that the petitioner is not entitled "to any judgment of the court in the premises," nor (g) is it entitled "to any relief or remedy, general or special;" (h) that the court has made no findings on the charges concerning the want of moral character of the respondent and concerning the question whether the respondent obtained the money and assignment from Bruce by false representations, and (i) that the finding that the respondent intended to appropriate the money was based upon his conduct in his interview with the sheriff and since that time; (3) a motion for a new trial (a) because of a mistake of law made by the court in the decision of the case; (b) because the findings of the court were against the evidence and the weight of the evidence; (c) because of newly discovered evidence, and (d) because of "all reasons at law for which a new trial may be granted." In support of this last motion so far as respected the newly discovered evidence the respondent

filed a writing entitled "Partial specification under the third ground of the motion for a new trial," specifying twenty distinct parts of the evidence which he expected to show to be erroneous, of which some were entirely immaterial to the issue tried and the others had only the most remote bearing upon it; he also filed several affidavits of the persons whom he desired to call as witnesses and his own affidavit of four pages as printed in the record before us. While many of the matters contained in his affidavit have only the most remote bearing, if any, upon the real merits of the case, it does contain some statements showing the work done by him as attorney for Bruce and bearing upon the value of his services as such, and also the statement that Bruce, well understanding the meaning and effect of the written assignment made by him to the respondent, intended thereby "that the whole \$800 should become absolutely the property of the respondent if the respondent could recover the same from the Commonwealth."

The respondent further filed a motion to amend the record so that it would show the respective days of the week of certain days of the month therein stated, and also would show that there "was no hearing before the court upon the question of sentence, or judgment, before the same was made and ordered," and that "no notice, verbal or in writing, was ever given to the respondent, or his attorney, that there would be any hearing" on this question. This motion was accompanied by an affidavit of the respondent in which he says that he never has received from any source "any notice . . . of any hearing to be had upon the judgment of disbarment by the court in said case, or any notice from the court itself; and that in fact . . . [he never has] . . . had a hearing or been heard upon the question of . . . [his] . . . disbarment."

All these four motions were heard by Fox, J., before whom the case originally was heard and by whom was made the order for disbarment; and on September 16, 1908, they were all denied. In denying the motions the judge placed on the record the following memorandum:

"Memorandum on Motion of the Respondent to Vacate and Arrest Judgment, Motion to Amend Record, Motion for New Trial and Motion to Extend the Time for Filing a Motion for New Trial.

"The respondent was given the fullest opportunity to be heard,

and was heard by counsel both upon the question what findings were warranted by the evidence, and what judgment should be entered upon the facts found, before the formal order for disbarment was entered. From that order he duly appealed.

"A Commissioner had been appointed to take the testimony, but upon the representation of the respondent's counsel that he was without means to take the case to the Supreme Judicial Court I ordered the case to be reported at the expense of the county of Suffolk. The report was agreed upon by counsel, and respondent had the opportunity of taking to the Supreme Judicial Court every question of fact and every question of law which he cared to argue.

"The motion for a new trial upon the ground of newly discovered evidence I deny, partly upon the ground that the conclusion to which I came as to the facts was based largely upon the testimony of the respondent himself. All the motions are denied."

To the order overruling the motion for a new trial the respondent filed exceptions which were disallowed as contrary to the truth as appears from the certificate of the judge indorsed thereon, and except as hereinafter stated, nothing further appears to have been done about these exceptions. The respondent also filed separate appeals from the denial of each of these four motions. Subsequently he filed another motion to extend the record which embraced some of the matters in the former motion to extend the record, and in addition some other things rendered needless by the action of the court. This motion, although supported by an affidavit of the respondent, was denied by the court on the ground that there was "no occasion for amending the record as requested."

The respondent further filed another motion to amend the record by striking out and expunging therefrom the "alleged formal judgment," being the order of April 9, 1906, that he be removed from the bar, "for the reasons that the same is a nullity; unauthorized in law as to the form, substance and rendition thereof; that it never was, is not and cannot be of any validity as a judgment; and was never regarded or treated by the respondent, or his attorney, in any other way than [as] a nullity." This motion was denied and the respondent appealed; and on the same day he appealed also from the order disallowing his exceptions on the motion for a new trial hereinbefore mentioned.

Meanwhile a motion to dismiss the appeals and exceptions for want of prosecution had been made by the petitioner, upon which the court made an order that the appeals should be entered in this court on or before October 1, 1909, from which order the respondent appealed.

• In this fairly complicated condition of things having but little, if any, bearing upon the real cause for disbarment, the case came to this court. 204 Mass. 331. Knowlton, C. J., there uses the following language (p. 333): "The case now comes before us upon appeals, which . . . are seven in number, as follows;" and he names them as they are hereinbefore recited. After dealing in detail with the several appeals, the court adjudged that "the orders appealed from are all affirmed, and judgment is to be entered in accordance with the order of April 9, 1906," which was the order of disbarment.

The rescript went down on January 7, 1910. On February 4, 1910, the respondent moved in arrest of judgment "for cause which affects the jurisdiction of the court but is not apparent of record; and which has not been heretofore waived, abandoned or adjudicated in this case; and which renders and makes all orders, decrees and judgments herein without jurisdiction, of no effect, illegal and absolutely null and void." It alleges in substance that every one of the judges of the Superior Court who made any order thereon was a member of the petitioner association and thereby disqualified by interest to act as judge in the case. For the same reason he filed a motion to vacate all the prior orders in the case. Upon a hearing upon these two motions it appeared that the several judges named in the motions were honorary members of the petitioner association, but the court ruled that they were not thereby disqualified. Both motions were denied and the respondent appealed.

At the hearing upon this motion to set aside and vacate all orders, etc., the respondent took certain exceptions to the rulings and refusals to rule, which exceptions were duly allowed. Upon these two appeals and this bill of exceptions, in each of which was raised substantially the same question, namely, whether the judges, being honorary members of the petitioner association, were thereby disqualified to act, the case for the third time came to this court (211 Mass. 187), and the question was adjudged in the negative;

and accordingly the exceptions were overruled and the orders denying the motions were affirmed.

This rescript went down February 29, 1912, and on March 1, 1912, the respondent filed a motion in arrest of judgment; on April 1, 1912, a motion to set aside findings and also a second motion in arrest of judgment. Each of these three motions was overruled on April 3, 1912, and from the decision in each the respondent appealed. He also filed exceptions to the "respective denials and overrulings," which exceptions were duly allowed. The case is now before us, for the fourth time, on these appeals, and this bill of exceptions.

The first motion in arrest of judgment contains five specific grounds beside the last which is thus stated: "And for every other ground, reason or cause at law for which said judgment may be arrested." The motion to set aside the findings specifies eleven particular grounds therefor, and the second motion in arrest of judgment names four specific grounds.

It is unnecessary to name in detail these various grounds for the motions. Most of the questions raised by them have been passed upon and settled in previous stages of the case, or could have been raised at the original hearing, and are not now open to the respondent. Perhaps the way fairest to him is to notice and consider specifically in detail those argued upon his brief.

It is first contended on the brief that the Bar Association is an actual party in the case, the only party plaintiff in fact in the case, and as such the sole author of the charges against the respondent, and that to hold that the association is not a party plaintiff "is against the express avowals and declarations of the corporation itself as appears by its special acts of record [and] its Constitution." In support of this contention various parts of the record of the court proceedings including extracts from the opinion of this court, and also extracts from the constitution and by-laws of the association are cited.

And, following out this conception of the nature of the proceeding, the respondent further contends that inasmuch as the charges concern his moral character and reputation, "the dearest of his inalienable rights," he has a constitutional right to a trial by jury, and that "the court could not conceivably of its own motion disbar an attorney on this charge [want of moral char-

acter], and in the history of jurisprudence, except in the present case, it never has been done." He further contends that the judge who heard the case was by reason of membership in the association disqualified to act; that summary jurisdiction of the court cannot be exercised on charges of bad character as a citizen; that the findings of the trial judge are not broad enough to cover the grounds set out in R. L. c. 165, § 44, under which, as the petitioner contends, it has been adjudicated that this petition was brought (see the report of the original hearing); that the subsequent particulars set out in the third paragraph of the petition even if true, "could have no possible bearing on the general charges against the respondent's moral character; neither could they have reference to all three general charges, deceit, malpractice and gross misconduct." Upon these various contentions the respondent argues in his brief at considerable length.

These contentions, so far as they relate to the nature of the proceeding, the relation of the association to it and the qualification of the judges of the Superior Court to act as affected by their membership in the association, were fully considered in 211 Mass. 187. We rest satisfied with the decision at that time reached. It is plain that there is nothing in the contentions so far as they relate to these matters.

The contentions so far as they relate to the nature of the charges and to the questions whether upon the allegations of the petition and upon the evidence the order of disbarment was legally and properly made, have been previously disposed of in the former adjudications of this court. 196 Mass. 100; 204 Mass. 331.

The respondent further argues that even if found guilty he was entitled to be heard upon the question of the sentence, whether it should be disbarment or only suspension for a certain time, or any other form of discipline; that he never has been heard, and also that he never has been heard upon the particular kind of variance upon which he relies. Upon this latter contention the respondent argues at great length. But it is plain that he has been concluded by our former decisions from again pressing these points. 196 Mass. 100. See the first motion (filed July 1, 1907) and 204 Mass. 331. They must be regarded as not further open to the respondent.

The latter part of the brief is devoted to an argument in favor

of the proposition that the court could not properly disbar him upon the evidence. This point, as has before been said, has been decided and is no longer open to him.

Since the case was submitted to this court this time upon a brief of the respondent, he has been allowed to file a supplemental brief. It is unnecessary to go over it in detail. So far as it touches upon matters covered by the first brief it calls for no additional remarks; so far as it covers other matters they are either immaterial or not now open to the respondent.

Assuming, without deciding, that the question of the constitutionality of R. L. c. 165, § 44, is now open to the respondent, it is sufficient to say that there is nothing in the point. The statute is not unconstitutional.

There is nothing contained in the points not argued upon the brief which calls for further discussion.

It follows that the motions were rightly overruled; and the orders appealed from are all affirmed.

Ordinarily we should stop here; but this record is of so extraordinary a nature that we feel constrained to call attention to it. We therefore have gone over it in considerable detail. The act of the respondent upon which these proceedings are based was not of a complicated nature, but was very simple. While he stood in the relation of an attorney to Bruce he received from him an order for \$800, being the sum Bruce had deposited as cash bail and then in the hands of the court. The main question at the original hearing was whether, as the respondent contended, the intention of Bruce was that the respondent should keep the money as absolutely his own, or whether, as the prosecution contended, his intention was that the respondent should hold it as security for his fees in the case and pay back to Bruce the balance after paying the sum due Lane, another attorney, for services. What the respondent did is not in dispute. He took the \$800, paid \$75 to Lane, and kept the balance as absolutely his property. If the respondent's contention as to Bruce's intention is the truth, then he did nothing wrong. If the contention of the prosecution is the truth, then the respondent could keep only such sum (after paying Lane's bill) as would reasonably compensate him, which sum the court fixed at \$250.

At the hearing both the respondent and Bruce testified, and on

each side were other witnesses. The trial judge filed a memorandum of findings. After reciting somewhat in detail the contention and evidence of the respondent he proceeds as follows: "It will be seen that the respondent, even upon his own story, has shown inadequate conception of his professional obligations. According to this story Bruce when in jail on the eve of trial offered to give to the respondent his entire fortune of \$800 if he would undertake his defense, and the respondent accepted the offer when he could not have known that one third of this sum would not be ample compensation for any service he could render. I am satisfied, however, that the story so far as it shows an absolute transfer of the fund from Bruce to the respondent is not true. Not only is it contradicted by the other testimony in the case, but it is inconsistent with the respondent's testimony above referred to of what occurred between Lane and Bruce and himself when he procured from Bruce the order in favor of Lane for \$75. . . . Upon all the evidence I find that Bruce authorized the respondent to receive the money from the clerk as his attorney and with the right to hold the money so collected as security for his fees, but the respondent in his interview with the sheriff, and by his conduct since that time, has indicated sufficiently his intention to appropriate the money to his own use. Respecting the conduct of the case I have no ground for believing that the respondent did not act for his client with fidelity and reasonable skill until his discharge. But \$250 would have been ample compensation for all the services rendered. I am constrained to hold, therefore, that the respondent has fraudulently appropriated to his own use a considerable sum of money belonging to his client. The fact that this client was in distress and helpless, and looked to him alone for help and protection, does not make the offense less grave, nor the duty of the court less clear."

This memorandum of findings was filed March 10, 1906, and on April 9, 1906, more than six years ago, the order for disbarment followed.

The act complained of was simple, the decision clear. The trial judge found that the contention of the respondent was not even consistent with his own testimony, and was not in accordance with the actual facts. Upon the entry of the disbarment

order there was begun by the respondent the remarkable course of procedure partially hereinbefore outlined. Of the various motions filed by him many are of the most technical nature, having no reference direct or indirect to the merits of the case. Many relate to questions not open to him at the time; many had been decided at a former stage of the case, and the most of them were as applied to the case frivolous when made. These remarks do not apply to the point raised by the respondent as to the competency of the judges as affected by their membership in the Bar Association.

By his course of procedure the respondent has managed to postpone a final decree for more than six and one half years, and still stands as a member of the bar.

Even after making all due allowance for the importance to him, as well as to the community, of the thing at stake, involving as it does his removal from the bar with all which that implies, still it is inconceivable that a person in the profession of the law could have believed as to many of the questions that there was any chance of success. A reading of the record forces upon the reader the conclusion that they were made for delay. And particularly is this true of the three motions now before us.

For obvious reasons it is especially important in cases of this kind, involving as they do the fitness of an individual to hold himself out as a legal and confidential adviser and to act as such, that the truth should be speedily ascertained and declared, and prompt action taken to clear from suspicion the innocent and to discipline the guilty.

Exceptions overruled.

Orders appealed from affirmed.

P. J. Casey, pro se, submitted a brief.

No argument or brief was presented for the petitioner.

BURTON HOLLAND vs. CITY OF BOSTON.

Suffolk. November 15, 18, 1912. — February 11, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, In use of highway, Violation of statute. *Automobile*. *Way*, Public.

In an action against a city for personal injuries sustained when the plaintiff was driving an automobile on a highway of the defendant by reason of an alleged defect in such highway, if it appears that the plaintiff at the time of the accident had no license to operate an automobile as then required by St. 1903, c. 473, §§ 4, 5, amended by St. 1905, c. 311, § 4, this fact, although it is evidence of the plaintiff's negligence, does not necessarily preclude his recovery.

Under St. 1903, c. 473, §§ 1-3, and St. 1907, c. 580, § 2, one, who is driving on a public highway an automobile which is not registered or to be "regarded as registered" in accordance with the provisions of those statutes, is a trespasser, and cannot maintain an action under R. L. c. 51, § 18, for personal injuries caused by a defect in such highway.

In an action against a city under R. L. c. 51, § 18, for personal injuries alleged to have been sustained by reason of a defect in a highway of the defendant when the plaintiff was driving an automobile, it appeared that the plaintiff was the owner of the automobile and that it was not registered, but that the plaintiff was in the employ of a dealer in automobiles, second hand and new, who was the agent for the kind of automobile that the plaintiff was driving, and the plaintiff testified that this automobile was used as a shop machine and was marked with the numbers of his employer, and that by agreement between the plaintiff and his employer the car was supposed to be used by anybody in the shop that wanted to use it. It could have been found that at the trial the defendant had acquiesced in an assumption of the plaintiff that the numbers on the automobile were distinguishing numbers or marks that had been assigned by the highway commission to the plaintiff's employer. *Held*, that the question, whether the automobile was controlled by a dealer in automobiles and bore his general distinguishing number or mark so as to be "regarded as registered" under the provisions of St. 1907, c. 580, § 2, was a question of fact to be submitted to the jury with the other issues in the case.

TORT, under R. L. c. 51, § 18, against the city of Boston for personal injuries sustained by the plaintiff on June 24, 1909, while driving an automobile on a public highway of the defendant called North Harvard Street in that part of Boston called Brighton, by reason of an alleged defect in that highway, consisting of a rope stretched across it. Writ dated August 11, 1909.

In the Superior Court the case was tried before *White, J.* The plaintiff testified, among other things, that he was by occupation

an automobile repair man and had been employed constantly as such for ten years previous to the date of the trial; that he had known how to operate an automobile ever since he had been in the business and had driven automobiles perhaps seventy-five thousand miles; that on or about June 24, 1909, he owned a Stanley automobile of the make of the year 1904, which weighed about a thousand pounds; that on that date, while travelling on North Harvard Street, a public highway in the Brighton district of the city of Boston, in this automobile, he ran into a rope stretched across the street, which rope slipped up over the front end of the automobile, caught him across the stomach and pulled him and the seat in which he was sitting out backward; that he did not see any policemen in the street but did see one on the left-hand sidewalk; that he did not see the rope and did not know it was there until the accident happened; that he did not see any signs, barriers, flags or horses in the street and heard no shout or warning.

The evidence in regard to the ownership and registration of the automobile is stated in the opinion. The plaintiff testified that his employer, Proctor, who is mentioned in the opinion, was engaged in the business of selling and repairing automobiles and was a dealer in automobiles both second hand and new; also that Proctor was agent for the Stanley automobiles and that the car which the plaintiff was driving at the time of the accident was a Stanley; that the plaintiff owned the car but that it was used as a shop machine and that Proctor's numbers were on it. It was agreed by the parties that the plaintiff's license as a chauffeur had expired in March, 1909, and had not been renewed before the accident happened.

The judge ruled that the plaintiff was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

F. D. Putnam, for the plaintiff.

J. A. Campbell, for the defendant.

SHELDON, J. The fact that the plaintiff was operating his machine over the highway and that he had no license under the statute then in force (St. 1903, c. 473, §§ 4, 5, as amended by St. 1905, c. 311), was not necessarily fatal to his right to recover. It was merely evidence of his negligence in the management of

his machine, to be considered by the jury in connection with the other evidence bearing upon that question. *Bourne v. Whitman*, 209 Mass. 155, 171.

But if his machine was not registered or to be regarded as registered as required by other sections of the statute, then his conduct in running it upon the highway and against the rope, the stretching of which across the street constituted the defect complained of, was the act of a mere trespasser, who could have against any one no other right than to be exempt from reckless, wanton or wilful injury. *Dudley v. Northampton Street Railway*, 202 Mass. 443. *Feeley v. Melrose*, 205 Mass. 329. *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 156 *et seq.* *Bourne v. Whitman*, 209 Mass. 155, 172. *Love v. Worcester Consolidated Street Railway*, 213 Mass. 137.

The plaintiff was the general owner of this machine, and it was not registered. But he contended that it was at this time controlled by his employer, one Proctor, and that it carried the distinguishing numbers which had been assigned to Proctor, under the provisions of St. 1907, c. 580, § 2, then in force, and that his machine was therefore in the words of that act, to be "regarded as registered." The evidence as to this was meagre. It was not shown by direct evidence that Proctor had applied to the highway commission for any distinguishing numbers or marks, or that the commission had taken any action upon such an application. This however seems to have been assumed by the plaintiff, and it could be found that the defendant had acquiesced in such assumption. Uncertain and equivocal as much of the plaintiff's testimony was, we cannot see that it did more than to raise a suspicion, perhaps a strong suspicion, that he had retained control of his machine, and that any use made of it for Proctor's benefit was merely by the plaintiff's permission and not as a matter of rightful control by Proctor. Undoubtedly the facts that the plaintiff was the owner of the machine and had had it registered in his own name, which registration had expired, and that he still retained to a considerable degree the custody, if not the possession of it, taking it to his own home at night, furnished evidence in support of the defendant's contention. *Feeley v. Melrose*, 205 Mass. 329. But the plaintiff testified also, that this was a shop car, that it was used as a shop machine, that Proctor's

numbers were put upon the car by his (Proctor's) authority, that the car was supposed to be used by anybody in the shop that wanted to use it, and that the plaintiff had come to that agreement with Proctor. In our opinion the question whether the car was really under the control of Proctor and carried the distinguishing numbers which lawfully had been assigned to him and so was to be "regarded as registered" under the statute, should have been submitted to the jury with the other issues in the case.

Exceptions sustained.

COMMONWEALTH vs. SUMNER P. SMITH.

Middlesex. January 13, 1913. — February 24, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Abortion. Evidence, Statements of symptoms to physician, Dying declarations under R. L. c. 175, § 65. Words, "Abortion."

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman, in consequence of which she died, the statements made by the woman to her attending physician of her bodily ailments and symptoms, for the purpose of enabling him to give proper medical advice and treatment by forming an opinion as to the cause of such ailments and symptoms, are admissible in evidence.

Whether, at the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman, in consequence of which she died, a statement made by the woman to her attending physician, not made as a dying declaration under R. L. c. 175, § 65, that an abortion recently had been performed upon her, is admissible in evidence against an exception of the defendant, even if the judge gives a clear and explicit direction to the jury that the statement of the woman to her physician is not competent to show that an abortion had been performed upon her, or, if such was the case, that the defendant had committed it or in any way had participated in it, here was referred to as a doubtful question under the decision in Commonwealth v. Sinclair, 195 Mass. 100.

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman, in consequence of which she died, in admitting in evidence dying declarations of the woman, under R. L. c. 175, § 65, her statement that the defendant had performed an abortion upon her and other statements referring to "the abortion" properly may be admitted as parts of such declarations, because the word "abortion" does not of itself import a charge of any criminal intent and such statements may be regarded as statements of fact rather than of opinion.

INDICTMENT, found and returned on September 4, 1911, under R. L. c. 212, § 15, charging that the defendant on August 4, 1911, at Lowell, with intent to procure the miscarriage of a woman named, did unlawfully use a certain instrument upon the body of such woman, and that in consequence thereof she died.

In the Superior Court the defendant was tried before *McLaughlin, J.*, and in the course of the trial excepted to the admission of certain evidence as described in the opinion. The judge "gave ample instructions to the jury, to which no exceptions were taken by the defendant." The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. J. Harvey, (*W. H. Wilson* with him,) for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

SHELDON, J. The defendant was charged with having performed an illegal operation upon Katherine Roark, in consequence whereof she died. Her statements to her attending physicians of her bodily ailments and symptoms, made for the purpose of enabling them to give proper medical advice and treatment by forming an opinion as to the cause of such ailments and symptoms, rightly were admitted. *Commonwealth v. Sinclair*, 195 Mass. 100, 108. It might be harder to sustain the admission of her further statement to them, not made as a dying declaration under R. L. c. 175, § 65, that an abortion had been recently performed upon her, if the defendant had excepted to its admission; *Commonwealth v. Sinclair, ubi supra*; but this does not appear. After the defendant's general objection to the admission of anything said by her to Dr. Whelan had been properly overruled, and after a consultation between counsel and the judge, that witness testified without objection that she said that an abortion had been performed upon her in Lowell, and the two last words were ordered stricken out by the judge. The witness then described his own physical examination of her, and was asked by the district attorney what was the opinion that he formed as to her condition. The question was not objected to, and the witness answered, "My opinion was that she was suffering from general peritonitis following a criminal abortion." The judge said that he did not understand that there was any objection to this answer; the defendant's counsel replied that he objected to the words "criminal abortion;" the judge ordered

the word "criminal" stricken out; and there was no further objection or exception as to this. The defendant again, a little further on in the examination of this witness, objected and excepted to "anything upon which he based his opinion;" but that was all, and of course the exception thus taken cannot be sustained.

Dr. Scannell, the other attending physician, also testified without objection that the woman told him that she had had an abortion done on her on August 4, in Lowell; and the defendant's counsel merely asked to have the words "in Lowell" stricken out. The witness then was asked, "Now will you tell us everything that she told you which was important and useful or helpful to you as a basis upon which to form your opinion about her condition and the cause of it?" The defendant saved a general exception to this question and to the answer which had not yet been made; but this general exception cannot be sustained for the reasons already stated. In reply, the witness said among other things that she told him that she had had an abortion performed; but there was no motion to strike this out, although another part of his answer was objected to and upon the objection was ordered stricken out.

It seems plain to us under these circumstances that the defendant did not care to save any specific exception to the admission of this statement; and this was probably because of the clear and explicit direction given by the judge to the jury that the woman's statements to the physicians were not competent to show that an abortion had been performed upon her, or that, if such was the case, the defendant had committed it or in any way participated in it. Accordingly we need not consider whether, under the decision in *Commonwealth v. Sinclair*, 195 Mass. 100, the admission of this testimony could have been sustained upon the ruling which was made.

The woman's dying declarations, both written and oral, were admitted in evidence. This was proper. But in these declarations she said that the defendant had performed an abortion upon her, and referred to "the abortion" in other parts of her declarations. Besides a general exception to the admission of her dying declarations, the defendant specifically excepted to the admission of these statements. He contends that

these were merely her opinion or conclusion that what the defendant had done to her had caused her miscarriage and had been done for that purpose and with that intent; and that if she had been a witness she could have stated merely what the defendant had said and done, and that only the jury could have drawn inferences therefrom. Undoubtedly her dying declarations were admissible only to those things to which she could have testified if she had been living and had been sworn as a witness. 1 Greenl. on Ev. § 159. And see the cases collected in 10 Am. & Eng. Encyc. of Law, (2d ed.) 377, and 21 Cyc. 988. But the defendant's contention is not well founded. In common language and in its legal acceptation the word "abortion" means simply a miscarriage, the premature delivery or expulsion of a human foetus before it is capable of sustaining life. It does not of itself import a charge of any criminal intent. 1 Words and Phrases, 20. 1 Am. & Eng. Encyc. of Law, (2d ed.) 186 *et seq.* 1 Cyc. 170, *et seq.* Her statement was simply the summing up of what the defendant, as she said, had done to her, and of the effect or result which had followed therefrom. It was a statement of fact rather than of opinion. It comes within the rule of our decisions. *Commonwealth v. Sturtivant*, 117 Mass. 122, 133, 134. *Commonwealth v. O'Brien*, 134 Mass. 198. *Beverley v. Boston Elevated Railway*, 194 Mass. 450. *Partelow v. Newton & Boston Street Railway*, 196 Mass. 24. *Gorham v. Moor*, 197 Mass. 522, 523, 524. In *Commonwealth v. Thompson*, 159 Mass. 56, 59, a physician testified that the cause of the death of a woman whom he had attended was the performance of an abortion upon her with instruments when she was advanced in pregnancy about five months. The court said in passing upon an exception taken both to this testimony and to the question which had called for it, that the only element of opinion involved in it beyond what an ordinary eyewitness might be supposed competent to express, was whether the injuries caused her death. As this was the ground upon which the exception was overruled, it was really a decision that any eyewitness could have testified that the defendant did perform an abortion upon the woman. That is enough for this case. In *State v. Wood*, 53 N. H. 484, 488, the defendant was indicted for the murder of a woman, alleged to have been committed by operating upon her for the purpose

of procuring an abortion. In his defense he was allowed to show her dying declaration that "she had been operated on" by another person "to procure an abortion."

This precise question has been decided elsewhere against the contention of the defendant. *Worthington v. State*, 92 Md. 222, 242 *et seq.* *Hawkins v. State*, 98 Md. 355. *State v. Leeper*, 70 Iowa, 748, 750. Dying declarations of somewhat similar purport were held to be admissible in *Maine v. People*, 9 Hun, 113, 116; *Shenkenberger v. State*, 154 Ind. 630, 636; *Lipscomb v. State*, 75 Miss. 559; *State v. Mace*, 118 N. C. 1244.

These declarations did not attempt to state the purpose of the defendant, as in *Montgomery v. State*, 80 Ind. 338, 346, or a conclusion of law, as in some of our own cases. The other decisions cited in behalf of the defendant do not seem to us to warrant his contention.

We need not consider the other exceptions in detail. They cannot be sustained. The judge gave ample instructions to the jury; and these were not excepted to, and must be taken to have been not only full, but wholly correct.

Exceptions overruled.

MAYOR AND ALDERMEN OF WORCESTER vs. BOSTON AND ALBANY RAILROAD COMPANY & others.

Worcester. September 30, 1912. — February 25, 1913.

Present: MORTON, LORING, BRALEY, & DE COURCY, JJ.

Grade Crossing Acts. Practice, Civil, Auditor. Worcester. Words, "Actual Cost."

In proceedings under a special statute for the abolition of certain grade crossings, which incorporates by reference, except as otherwise provided, the provisions of St. 1900, c. 387, and acts in amendment thereof "the total actual cost" of the alterations which is to be apportioned among the contributing parties is the whole amount expended on the entire work with such allowances and deductions, if any, as should be made in order to arrive at a correct result, and an auditor appointed under the provisions of St. 1900, c. 387, § 7, is not bound to allow as such actual cost expenditures of a railroad corporation, made in doing the work imposed upon it by a decree of the Superior

Court, merely because such expenditures were made honestly and in good faith, unless the railroad corporation also exercised due care and diligence to protect the interests of the contributing parties.

In proceedings under St. 1900, c. 387, as amended by St. 1902, c. 508, St. 1903, c. 115, and St. 1905, c. 422, providing for the abolition of grade crossings in the city of Worcester, an order of the Superior Court required the construction by the Boston and Albany Railroad Company of "suitable retaining walls and masonry" for the railroad and tracks of that company affected by the changes. That company asked to be allowed for the amount of money paid by it upon contracts for the construction of concrete masonry. It appeared that the company, in good faith and for the purpose of expediting the work, had permitted the use of unscreened gravel instead of screened gravel until a screening plant could be completed and placed in operation, that the use of the unscreened gravel reduced the cost of the concrete to the contractor but that the railroad company paid for this concrete the full contract price, for which it asked to be allowed as against the Commonwealth, the New York, New Haven and Hartford Railroad Company and the city of Worcester. It was found by the auditor, to whom the case was referred under the provisions of the statute, that the masonry thus furnished by the Boston and Albany Railroad Company was suitable for the purpose for which it was required and that the railroad company was entitled as matter of law to have the "actual cost" of the work done by it allowed, but he found as facts that at the time the railroad company permitted the substitution of the unscreened gravel no circumstances existed that made such substitution necessary, and that in giving such permission to the contractor the railroad company failed to exercise reasonable care and diligence to protect the contributing parties from paying the full contract price for an inferior and less costly material. The auditor found that the difference between the value of the concrete contracted for and that furnished was about \$3,500 and that the part of this to be paid by the contributing parties would be about \$2,000, and found that this amount should be disallowed. *Held*, that on the facts found by the auditor his rulings and decision were right.

In proceedings under a special statute for the abolition of certain grade crossings, which incorporates by reference, except as otherwise provided, the provisions of St. 1890, c. 428, and acts in amendment thereof, the report of an auditor appointed under St. 1890, c. 428, § 7, has the force and effect of the report of a master in a suit in equity, and where the evidence is not reported the findings of such an auditor cannot be set aside unless they are plainly inconsistent with facts found by him and are clearly wrong.

MORTON, J. By St. 1900, c. 387, as supplemented and amended by St. 1902, c. 508, St. 1903, c. 115, and St. 1905, c. 422, provision was made for the abolition of grade crossings in the city of Worcester. By reference, the provisions of St. 1890, c. 428, "An Act to promote the abolition of grade crossings," and acts in amendment thereof and in addition thereto were incorporated into St. 1900, c. 387, except as otherwise therein provided. St. 1900, c. 387, § 8. The appointment of an auditor to whom from time to time should be submitted "all accounts

of expense," and who should audit the same and make report thereon to the court was thus provided for. St. 1890, c. 428, § 7. The questions in this case,* arise upon the forty-eighth report of an auditor so appointed. They relate to certain items submitted by the Boston and Albany Railroad Company. The material facts relating to these items as found by the auditor are briefly as follows.

Amongst other things required of the Boston and Albany Railroad Company by the decree of the Superior Court confirming the report of the commissioners was the construction by it of "suitable retaining walls and masonry" for the railroads and tracks affected by the proposed changes. In the performance of the work thus imposed upon it the Boston and Albany Railroad Company entered into contracts for the construction of concrete masonry. The prices contracted for and paid by it and for which it claimed to be allowed as items of expense were based on the use of certain definite proportions of cement, sand and stone, the last to be either broken stone or screened gravel.

The contracts were entered into about the middle of June, 1911, and at that time the contractors had not sufficient facilities to screen the gravel required, and the Boston and Albany Railroad Company through its chief engineer permitted the use of un-screened or "run of bank" gravel until a sufficient screening plant could be installed. "Run of bank" gravel was used in the concrete masonry up to August 7, when the use of broken stone was begun, and continued till a screening plant was completed and placed in operation on September 13. Neither of the contributing parties knew of the contracts, if that is material, or of the use of "run of bank" gravel before August 7. The use of "run of bank" gravel resulted in a product somewhat inferior in quality and less in cost to the contractors than the concrete called for by the contracts. The difference in cost between the material for the concrete contracted for and that furnished fairly represented the difference in value between the concrete contracted for and that furnished, and the auditor found such difference to be \$3,489.46, of which the proportion of the Commonwealth, and the New York, New Haven, and Hartford Railroad Company and the city of

* Reserved and reported by *Pierce, J.*, for determination by this court.

Worcester is \$2,063.93; and they contend now, as they did before the auditor, that it is not a proper item of expense and should not be allowed. The auditor so found and ruled subject to various objections and exceptions on the part of the Boston and Albany Railroad Company, and the correctness of that ruling is the principal question before us. There are one or two subsidiary matters to which we will refer later.

The auditor found that the Boston and Albany Railroad Company had not been guilty of any dishonesty or bad faith towards any of the other parties to the proceedings; that the masonry provided by it was amply sufficient in kind and amply strong and sufficient in quality for the purposes for which it was intended with a suitable margin for safety; that the price agreed to be paid for it was reasonable if not low; that the variance from the contract was not intended to be permanent but merely as a temporary expedient to hasten the beginning and completion of the masonry contracted for; and that taking the entire work done under the contracts and determining the loss or gain with reference to that part of the work in which the unscreened gravel was used, the contractors made no profit as the result of the use of the unscreened gravel.

He also found that at the time when the railroad company allowed "run of bank" gravel to be substituted for screened gravel no circumstances existed which made such substitution necessary; that when consenting to the variance from the contract it failed to protect the contributing parties from paying for an inferior and less costly material the price contracted to be paid for the material specified in the contract, and that it allowed the substitution to be continued for a time and an amount of masonry to be furnished under the contract as varied which called upon the contributing parties to pay a substantial sum more than the concrete was worth; and that it did not exercise reasonable care and diligence to protect the interests of the contributing parties.

The Boston and Albany Railroad Company contended that, the auditor having found that there was no dishonesty or bad faith on its part and that the masonry was suitable for the purpose for which it was required, it was entitled as matter of law to have the actual cost of the work done by it allowed. But the auditor ruled

in effect that, while the railroad company could construct or contract for any kind or quality of concrete masonry that was suitable for the purpose for which it was required, it could not contract for one kind or quality at a fair and proper price and subsequently, without reasonable cause, permit the substitution of an inferior and less costly kind of masonry at the same price, but was bound, as regarded the contributing parties, to use reasonable care and diligence in seeing that the material furnished was worth the contract price.

By statute "the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages," is to be divided in certain proportions amongst the parties liable. St. 1890, c. 428, § 3. R. L. c. 111, §§ 149-160. Sts. 1906, c. 463, Part I, §§ 29-45; 1908, c. 390. The decree of the Superior Court follows the statute. Cases involving questions whether certain items were or were not included in "the total actual cost" of the abolition of grade crossings have been before this court, and the meaning of that phrase has been considered. *Boston & Albany Railroad v. Charlton*, 161 Mass. 32. *Mayor & Aldermen of Newton, petitioners*, 172 Mass. 5. *Providence & Worcester Railroad, petitioner*, 172 Mass. 117. *Selectmen of Norwood, petitioners*, 183 Mass. 147. *Selectmen of Westborough, petitioners*, 184 Mass. 107. *Old Colony Railroad, petitioner*, 185 Mass. 160. By "the total actual cost" is meant the whole amount expended on the entire work with such allowances and deductions, if any, as should be made in order to arrive at a correct result. See *Boston & Albany Railroad v. Charlton, supra*; *Mayor & Aldermen of Newton, petitioners, supra*. The cost is actual cost as distinguished from estimated price or market value and excludes anything in the nature of a profit or return on the capital invested. *Mayor & Aldermen of Newton, petitioners, supra*. The fact that in the performance of work required of it one of the parties has honestly and in good faith made certain expenditures, does not of itself without anything more constitute the expenditures so made items of expense which the auditor is bound to allow. In a sense the alterations required constitute a common undertaking, and each of the parties is not only required to deal honestly and in good faith with all the other parties, but is also required to exercise

due care and diligence to protect their interests in regard to all matters to the cost of which they are required to contribute.

The question is not whether the masonry was up to the standard required by the decree, or was suitable for the purpose for which it was intended, or whether the contractors, taking the work as a whole, did or did not make a profit by the use of "run of bank" gravel, but whether the railroad company discharged its duty towards the contributing parties, and whether, assuming that it could depart from the contracts and specifications, it has paid as between it and them no more for the masonry than in the exercise of due care and diligence, taking all the circumstances into account, it ought reasonably to have paid. Any other rule would or might take away incentives to proper business dealings and methods which otherwise would exist.

In the present case the auditor has found that due care and diligence were not exercised by the Boston and Albany Railroad Company to protect the interests of the contributing parties, and that when the variance from the contract was permitted and the use of "run of bank" gravel was allowed, no circumstances existed which made such substitution necessary. The report of the auditor has the force and effect of the report of a master. *Selectmen of Norwood, petitioners, supra*. The evidence, except upon a single point, is not reported, and the findings of the auditor cannot be set aside unless plainly inconsistent and clearly wrong (*Eddy v. Fogg*, 192 Mass. 543), which we do not think they are.

The evidence in regard to the finding by the auditor, that no circumstances existed which made the substitution of "run of bank" gravel necessary, is before us. If the auditor had found that circumstances did exist which rendered the substitution necessary, we should not have been able to say that the finding was wrong, nor can we on the other hand say that his finding that no such circumstances did exist was plainly erroneous. The question is one on which different minds might come to different conclusions, with the result that neither conclusion can be pronounced plainly wrong. It follows that the ruling and finding of the auditor on the principal question at issue was correct.

The contracts were properly admitted in evidence by the auditor for the purpose for which he admitted them, which was to

show the quality of the concrete masonry which had been fixed upon by the railroad company.

Exceptions overruled and report confirmed.

Decree accordingly.

F. B. Greenhalge, Assistant Attorney General, for the Commonwealth, was not called upon.

E. H. Vaughan & C. S. Anderson, for the city of Worcester, also were not called upon.

R. A. Stewart, for the defendants.

EDGAR AMIOT *vs.* MARCUS L. FOSTER.

Worcester. September 30, 1912. — February 25, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DE COURCY, JJ.

Negligence, In use of elevator, Violation of statute. Elevator.

At the trial of an action against a person controlling a building by an employee of one of the tenants therein for personal injuries sustained by a fall from a freight elevator which was furnished by the defendant for use by the tenants, it appeared that the defendant retained control of the elevator and kept it in repair, that the tenants and their employees operated it when they had occasion to use it, that between the back of it and the wall of the well was an opening two and one half feet wide, that the elevator was equipped with a bar which could be lowered across the back or could be kept up, that the plaintiff had been in the employ of the tenant about two and a half years, "had always been around" the elevator during that time and knew of the bar and of the hole between the elevator and the wall, that in helping to place a load on the elevator just before his injury he had backed upon the elevator, that the bar was not down when he started to enter the elevator and that he made no attempt to put it down, and that when two or three feet from the end of the elevator he "stubbed" his heel and fell backward between the elevator and the wall. There was evidence tending to show that the plaintiff might have been caused to fall by a slight depression in the floor of the elevator. *Held*, that as a matter of law the plaintiff was not in the exercise of due care.

One who is in control of an elevator is not liable to a person who, while not in the exercise of due care, is injured by a fall from the elevator by reason of a failure to equip it with the safe-guards required by R. L. c. 104, § 43.

MORTON, J. This is an action of tort to recover for injuries received by the plaintiff in falling down an elevator well in a build-

ing belonging to the defendant. At the close of the evidence a verdict was ordered for the defendant.* The case is here on report with a stipulation by the parties that if the ruling was right judgment is to be entered for the defendant, but if there was evidence for the jury judgment is to be entered for the plaintiff for \$1,000.

We think that the ruling was right. The building, in which the elevator was, consisted of four stories including the ground floor, and was all occupied by tenants of the defendant, of whom the plaintiff's employer, a Mr. Dick, was one. The elevator with the power to run it was furnished by the defendant for the use of the tenants. He retained the control of it and kept it in repair. The tenants and their employees operated it themselves as they had occasion to use it. Between the north end of the elevator and the wall was an opening two and a half feet wide. It was down this opening that the plaintiff fell. On the elevator next to this opening was a wooden bar which could be dropped down across the end of the elevator by the person using it. It was hinged at one end to one of the posts of the elevator, and when not in use stood upright against the post, being held in that position by a clutch. The extent to which the bar would operate as a protection when down was in controversy by reason of the fact that a diagonal iron brace had been put on the elevator by the defendant and the end of the bar fell on that instead of into the latch originally designed for it. The end of the bar projected half or two-thirds of the way by a post on the side of the elevator where the brace was. There was evidence to the effect that if one put his hand on the bar when down and leaned on it, it would slip and would be no protection. But there was also evidence that it "was a protection against any one pressing out or falling over that end that way," as it would seem plain that it must have been. The brace with safety gates at the south end of the elevator where it was entered from the three upper floors, was put on by the defendant about six months before the accident. The bar was not down when the plaintiff fell, and no attempt was made by him to put it down. There was evidence tending to show that it had not been used by the tenants, either before or after the brace was

* By *Keating, J.*, before whom the case was tried.

put on. The plaintiff had been in Mr. Dick's employ about two and a half years, and as he testified had "always been around this elevator during the time" that he had worked for Mr. Dick, and knew of the bar and of the hole at the north end of the elevator. At the time of the accident he was engaged with a truckman in loading on to the elevator at the fourth floor a panel screen of hard wood ten or eleven feet long and two or three feet high, to be taken from Mr. Dick's place to the storehouse. He was backing on to the elevator with one end of the screen and had backed, as he thought, to within two or three feet of the edge when, as he testified, "I stubbed my heel, stepped backwards and fell right over backwards over the edge of the elevator at the north end," receiving the injuries complained of.

One of the grounds of liability declared on was that the defendant had not complied with the requirements of R. L. c. 104, §§ 4-10, the corresponding provisions of which had been accepted by the city of Worcester, or of those of § 43 of the same chapter; and one of the building inspectors of the city of Worcester was permitted to testify, against the objections of the defendant, in regard to that matter.

The cases of *Taylor v. Hennessey*, 200 Mass. 263, and *Freeman v. Hunnewell*, 163 Mass. 210, would seem to go far towards disposing of this case on the ground of the plaintiff's want of due care. He backed on to the elevator knowing that the hole was there and that the bar was not down. Such an accident as occurred, if not fairly to be expected as within the range of probability, was at least possible, as the event has shown, and he took no precautions to guard against it. It is no excuse that the bar if down would or might not have been a protection, or that it had not been used. It was there for the express purpose of being used to prevent a person from falling over the edge of the elevator, and until tried and found insufficient no one operating the elevator could neglect to use it except at his peril. If there was a slight depression or worn place in the floor of the elevator, which it is difficult to see in the photographic exhibits submitted to us, where the plaintiff might have stubbed his heel, more rather than less care was required of him by reason thereof. The defendant's failure to comply with the statute or to follow the directions of the inspector of buildings do not affect the question of the plaintiff's due care,

though bearing upon the question of the defendant's negligence. See *Marshall v. Norcross*, 191 Mass. 568; *Keenan v. Edison Electric Illuminating Co.* 159 Mass. 379.

Judgment for the defendant.

M. M. Taylor, for the plaintiff.

F. F. Dresser, for the defendant.

CARROLL REYNOLDS vs. WILLIAM J. DENHOLM.

Worcester. September 30, 1912. — February 25, 1913.

Present: RUGG, C. J., MORTON, BRALEY, & DE COURCY, JJ.

Agency, Scope of employment.

At the trial of an action for personal injuries caused by the plaintiff being run into by an automobile of the defendant, it was admitted by the defendant that at the time of the accident the automobile was being operated by a driver who was in his employ, and there was evidence tending to show that the defendant had provided the automobile with the driver for the use of his family, that the driver had no fixed hours of employment but was subject at all times to the directions of the family, that he slept at the defendant's house but got his meals at a house half a mile away and had his laundry done at another place about as far distant, the defendant paying for the meals and laundry as part of his wages, that he was allowed by the family without objection to use the automobile to go to his meals and to get his laundry as he found it convenient, and that, as he was going in the automobile for his laundry after having been to his supper and before returning to the defendant's house, he ran into the plaintiff. *Held*, that the question of the defendant's liability was for the jury, who on the evidence would be warranted in finding that the use of the automobile by the driver at the time of the accident was incident to his employment or was permitted or assented to either expressly or impliedly by those having authority from the defendant.

MORTON, J. This is an action of tort to recover for injuries caused by a collision of the defendant's automobile with the team driven by the plaintiff. The accident occurred August 7, 1910. At the close of the evidence the presiding judge * directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to that ruling.

* *Irwin, J.*

The question is whether the evidence warranted a finding that what the driver of the machine was doing at the time of the accident came within the scope of his employment. The case is a close one and seems to have been tried with a hesitating touch on both sides. But it was finally admitted that the defendant owned the automobile and that it was being operated at the time of the accident by a chauffeur who was in the defendant's employ. It appeared, or there was evidence tending to show, that the chauffeur was employed to drive the automobile for the defendant's family whenever they wanted to use it; that he slept in the house occupied by the defendant and his family but took his meals at another place about half a mile distant, and that his laundry was done at still another place about as far away; that both his meals and his laundry were paid for by the defendant as a part of his wages; that he had no stated hours of service, but was subject at all times to the directions of the defendant's family; that "oftener than any other way" he went to his meals in the automobile, though he sometimes went on foot and sometimes in a carriage; that he went for his laundry at different times in the day as was convenient; that on the evening when the accident occurred he had been to his supper in the automobile and after supper was on his way to get his laundry at the time of the accident, and then to return to the house of the defendant to await orders; and that after the accident he went on and got his laundry and then went back to the defendant's house. We think that it could fairly be inferred from the evidence that he had been at other times after his laundry in the automobile, though never at the same time of day as when the accident occurred. We have then a case, as it seems to us it fairly could be found, of an automobile with a chauffeur to operate it provided by the defendant for the use of his family, the chauffeur having no fixed hours of service but subject at all times to the directions of the family, sleeping in the house and getting his meals and laundry elsewhere, for which the defendant paid as a part of his wages, and allowed or suffered by the family without objection to use the automobile to go to his meals and to get his laundry as he found it convenient, and while going on for his laundry in the automobile after he had got his supper, running into and injuring the plaintiff. If under these circumstances the jury should find that the use of the auto-

mobile by the chauffeur in going for his laundry was an incident of his employment, or was assented to either expressly or impliedly by those having authority from the defendant to direct the conduct of the chauffeur, then we think that the defendant would be liable. And we do not see how it can be ruled as matter of law that the jury could not so find. The question is not one of actual knowledge or express authority on the part of the defendant, but whether, taking all of the circumstances relating to the chauffeur's employment into account, his use of the automobile as and for the purpose for which he was using it at the time of the accident was incident to his employment, or was permitted or assented to either expressly or impliedly by those who were acting under authority received from the defendant. It does not seem to us that in the present case the fact that in going to the place where his laundry was the chauffeur went by and beyond the road that led to the defendant's house and away from the defendant's house is material, though in *McCarthy v. Timmins*, 178 Mass. 378, importance was rightly attached to a similar circumstance. See *Bourne v. Whitman*, 209 Mass. 155, 172; *Fleischner v. Durgin*, 207 Mass. 435; *Burns v. Poulson*, 8 C. P. 563.

Exceptions sustained.

The case was submitted on briefs.

J. A. Thayer, C. B. Perry & P. D. Howard, for the plaintiff.

C. C. Milton & F. L. Riley, for the defendant.

GEORGE W. DAW vs. GEORGE H. LALLY & another.

Nantucket. October 28, 1912. — February 25, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DE COURCY, JJ.

Practice, Civil, Exceptions. Way, Private. Easement, By prescription. Evidence, Declarations of deceased persons. Agency. Husband and Wife.

A motion in this court to dismiss a bill of exceptions filed in the Superior Court, on the ground that the exceptions were allowed on August 15 and were not entered in this court until the following October, cannot be allowed when the circumstances attending the entry are not before the court.

In an action for the obstruction of a right of way alleged to have been acquired by prescription, where the defendant contends that the use of the way by the plaintiff's predecessor in title was permissive and not adverse, the defendant after the death of his predecessor in title may introduce evidence of a declaration by his predecessor in title that he had given to the husband of the plaintiff's predecessor in title permission to put a gate in the fence between the two properties giving access to the strip of land over which the right of way is claimed, if there also is evidence that after the time when such permission was given the husband had a gate made in the fence which was used by him and his wife and other members of the family, and that the husband in this and other matters relating to the property acted as the agent of his wife with her knowledge.

MORTON, J. This is an action of tort for the obstruction of an alleged prescriptive right of way claimed by the plaintiff as appurtenant to premises belonging to him in Nantucket. The plaintiff acquired title to the premises in November, 1902, from one Henry Mitchell. Mitchell's wife, Mary Chilton Mitchell, purchased them in 1883 and devised them in fee to her husband by her will which was duly probated in March, 1902. The strip over which the right of way is claimed as appurtenant to the plaintiff's premises was part of a tract of land formerly known as the Raymond and Ellis land, which adjoins the plaintiff's lot on the west. The owners of this land, before 1883, surveyed and divided it into house lots and arranged for passage-ways and delineated the lots and ways on a plan duly recorded. One of the ways was marked on the plan "Grant Avenue" and extended from a public way, a distance of one hundred feet, to the line of the premises formerly of Mitchell, now of the plaintiff, where it terminated. The lots on the north side of this way belong to the defendant Lally and those on the south side to the defendant Brock, who acquired them from her father, George H. Brock. The right of way claimed by the plaintiff was over this strip called Grant Avenue. "There was evidence tending to show that the ownership of Lally and Brock extended to the centre of said Grant Avenue, so-called, and that they closed said way to use as a pass [age] way on or about November 4, 1908." This was the obstruction complained of. "The plaintiff offered evidence tending to show use of said way by the plaintiff's predecessors in title for more than twenty years prior to the bringing of this action, as a means of access to and egress from said land now belonging to the plaintiff." The case was heard by a

judge * without a jury, and the judge found "that the use by Mary Chilton Mitchell and Henry Mitchell of the land over which the plaintiff now claims a right of way was not adverse."

In the course of the trial the defendant Brock was permitted subject to the plaintiff's exception to testify to a conversation which her father told her he had with Mr. Mitchell,† which tended to show that the use of the way in connection with the premises now belonging to the plaintiff began in 1892 and was permissive in its origin and not adverse. At the time of the trial the defendant Brock's father and Mitchell were both dead. The exception to the admission of this evidence is the only exception before us.

The defendant's brief begins with a motion that the exceptions be dismissed for the reason that, though allowed August 15, 1911, they were not entered in this court till October. But the circumstances attending the entry in this court are not before us and the motion cannot therefore be allowed.

It is manifest that if the premises had belonged to Mitchell instead of to his wife, the conversation testified to by the defendant Brock would have been admissible. *Hall v. Reinherz*, 192 Mass. 52. It is objected that there is nothing to show that Mitchell was acting as his wife's agent. But there was evidence tending to show that after the conversation Mitchell had a large gate opening into Grant Avenue built in the fence which separated his wife's land from Grant Avenue, and that the gate was used by himself and his wife and other members of the family. And from these and other circumstances ‡ testified to it was competent for the presiding judge to find that Mitchell acted as agent of his wife and that she was chargeable with knowledge of the fact, if it was a

* *Jenney, J.*

† This testimony was as follows: "My father came home from the cliff one day and said to my mother and myself, 'I have done something to-day for which I am very sorry for. Professor Mitchell came in and asked me to let him put a gate in the fence between his property and mine. I hesitated, but he urged the matter and rather than be disobliging to a neighbor I finally assented, and I am very sorry, and I am afraid it will cause trouble in the future.'"

‡ It further appeared "that during the life-time of his said wife, Mitchell occupied the premises with his wife and family and exercised the control and

fact, that the way was used by permission. See *Dyer v. Swift*, 154 Mass. 159; *Simes v. Rockwell*, 156 Mass. 372. It cannot be said therefore that the evidence was wrongly admitted.

Exceptions overruled.

C. J. Goldman, (C. N. Barney with him,) for the plaintiff.

H. B. Worth, for the defendants, was not called upon.

JENNIE D. WILLIAMS vs. INHABITANTS OF WINTHROP.

Suffolk. November 11, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way, Public: defect. *Negligence*, In use of highway. *Practice*, Civil, Conduct of trial: requests and instructions, Exceptions. *Evidence*, Competency.

At the trial of an action by a woman against a town for personal injuries alleged to have been caused by a defect in a public way, where, besides evidence as to the season of the year, precedent weather conditions, amount and character of travel and other attendant circumstances, there is evidence tending to show that as the plaintiff, an experienced driver, was driving a team on the way in question and was turning into an intersecting street, she looked at the street ahead and saw nothing on the surface to indicate a defect, and that the carriage was caused to tip and throw her out because it ran into two depressions, one of which was six or more inches deep, with a mound between them, the questions, whether the plaintiff was in the exercise of due care and whether the accident was caused by a defect in the way, are for the jury.

At the close of the evidence at the trial of an action against a town for injuries alleged to have been caused by a defect in a public way, the defendant presented twenty-two requests for rulings, three of which were to the effect that the burden of proof was on the plaintiff on the issues of his due care and of notice to the defendant of the defect. The charge made no specific reference to the question of the burden of proof, but stated that the several issues in dispute must be established in favor of the plaintiff before a verdict for him could be returned. From the language of the charge it might be inferred that in other cases previously tried before the same jurors full instructions had been given to them respecting the burden of proof. At the close of the charge the defendant's counsel asked that exceptions be noted as to requests that had been denied, several of which contained correct statements of the law relating to

management of the household usually exercised by the husband, and that he directed certain improvements on the premises, such as the moving of the cottage back from the roadside, and generally did those things about the house and lot usually done by the husband of an owner."

the burden of proof. The judge replied, "Yes. They are principally that there is no evidence," and the defendant's counsel replied, "Yes." *Held*, that, although the defendant was entitled to full and accurate instructions touching the matter of the burden of proof, the exceptions to the failure to grant the requests in question must be overruled, because it was the duty of the defendant's counsel, if such specific instructions were desired, to call them to the attention of the judge at the close of the charge, and not to permit the judge to think that the requests related only to whether there was any evidence which should be submitted to the jury.

At the trial of an action against a town for personal injuries alleged to have been sustained by reason of depressions in a public way, which caused the carriage of the plaintiff to tip and throw him out, evidence that on previous days other wagons had been seen to go up and down and tip at the same place is inadmissible for the purpose of showing a defect in the way or to prove notice of the defect to the defendant.

TORT for personal injuries alleged to have been suffered by the plaintiff on August 7, 1902, by reason of a defect at or near the intersection of Hutchinson Street and Revere Street, public ways of the defendant, and to have been caused by depressions which caused a carriage that the plaintiff was driving to tip, throwing out the plaintiff. Writ dated August 18, 1902.

In the Superior Court the case was tried before *Harris, J.* The material facts are stated in the opinion. There was a verdict for the plaintiff in the sum of \$2,500. The defendant alleged exceptions, which, after the resignation of *Harris, J.*, were allowed by *Jenney, J.*

J. B. Studley, (K. McLeod with him,) for the defendant.

E. R. Anderson, (J. G. Bryer with him,) for the plaintiff.

RUGG, C. J. This is an action of tort to recover compensation for injuries received through an alleged defect in a public way upon which the plaintiff was a traveller.

1. There was evidence tending to show that the plaintiff was an experienced driver, and that as she turned her horse from one street to another she was looking at the street ahead, and saw nothing about the surface of the street to indicate a defect. It was for the jury to determine, upon this evidence and upon all the circumstances, as men of common experience, whether the plaintiff was in the exercise of due care. *Thompson v. Bolton*, 197 Mass. 311. *Stoliker v. Boston*, 204 Mass. 522, 534. *Cutting v. Shelburne*, 193 Mass. 1.

2. There was evidence tending to show that there were two depressions in the street described by some witnesses as holes, one of

which was six or more inches deep, with a mound between. It was for the jury to say whether this was a defect, taking into account the season of the year, precedent weather conditions, the amount of travel upon the street, and all the other attendant conditions.

3. At the close of the evidence, the defendant presented twenty-two requests for instructions, three of which were to the effect that the burden of proof was upon the plaintiff to establish that she was in the exercise of due care, and that the defendant had notice of and should have repaired the defect. At the close of the charge the counsel for the defendant asked that exceptions be noted to requests that had been denied, to which the presiding judge said, "Yes. They are principally that there is no evidence." To this the defendant's counsel replied, "Yes, sir," and the judge said, "I will save your exception." Although the charge made no specific reference to the burden of proof, it stated correctly and plainly that the jury, before they could return a verdict for the plaintiff, must find the various facts necessary to make out liability on the part of the defendant, and that the several issues in dispute must be established in favor of the plaintiff. It is apparent also from the charge that the jury had tried other tort cases before this one. Under these circumstances, if the defendant's counsel had desired a specific instruction upon such an elementary principle as the burden of proof, he should have called it more pointedly than he did to the attention of the judge at the close of the charge. It is fair to infer that at some previous time full instructions had been given to the jury respecting the burden of proof, which it was not thought necessary to repeat in every case. Of course each party to a cause is entitled to have full and accurate instructions given touching every point involved. But the charge gives the impression that the nature of the burden of proof had been explained to the jury, and that they were acquainted with it. The colloquy at the close of the charge shows that the only matter in the mind of the judge as to which he had not instructed in accordance with the requests of the defendant was that going to the essence of the plaintiff's case, and requests to that effect, of which there were a considerable number, were refused. Under these circumstances, if the defendant had desired a definite instruction upon the burden of proof, it was his duty to call it directly to the attention of the judge, and

not by assenting to his interrogatory, to the effect that the refusals related principally to the point that there was no evidence on which the plaintiff could go to the jury, lead the court to think that nothing else was relied on.

4. A witness who lived near the place of accident, called by the plaintiff was permitted to testify, against the objection and exception of the defendant, that between the day of the accident and the preceding Sunday she had observed that "If an express wagon or grocery team would come that way they would always go down and jump up and go down again, and some came around with one wheel in the air." The judge admitted this as tending to prove notice to the defendant. It is plain that such evidence is not admissible for the purpose of showing a defect in the way. This has been decided too many times to require more than a reference to one or two authorities. *Collins v. Dorchester*, 6 Cush. 396. *Marrin v. New Bedford*, 158 Mass. 464. The question of difficulty is, was it admissible on the issue whether the defendant "had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair" (R. L. c. 51, § 18) in the way. Generally in this Commonwealth evidence of this character has been excluded. We are aware of no instance heretofore in which it has been admitted against objection. In *Yore v. Newton*, 194 Mass. 250, evidence of like character was held to have been excluded properly and it was said that it might have been done in the exercise of judicial discretion. But that case is no authority for the proposition that such evidence is competent or that it may be admitted under any circumstances.

Such evidence has been held in other cases to have been properly rejected, on the ground of raising collateral issues. *Merrill v. Bradford*, 110 Mass. 505. *Blair v. Pelham*, 118 Mass. 420. In *Kidder v. Dunstable*, 11 Gray, 342, it was said: "In an action for injury sustained in a highway, by reason of an alleged defect therein, evidence is not admissible, either that a person, not a party to the action, has received an injury at the same place, or has safely passed over it." These cases treat the matter as a positive rule of law. Even if it were to be regarded as matter of judicial discretion, it would be unfortunate if the discretion were "not exercised in the same way under the same circumstances." *Sargent v. Merrimac*, 196 Mass. 171, 175. No hardship will befall

a plaintiff because notice or reasonable ground to infer notice to a municipality of a defect in a highway is commonly susceptible of ready proof by other evidence. *Reed v. Northfield*, 13 Pick. 94. *Chase v. Lowell*, 151 Mass. 422. Under these circumstances we think it better to adhere to that which has been declared and understood generally to be the law of this Commonwealth, and hold that such evidence is inadmissible.

Exceptions sustained.

EPAPHRO A. DAY vs. MELISSA L. MILLS.

Hampden. November 11, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Review. Equity Pleading and Practice, Petition for review, Appeal, Decree, Order for decree. *Supreme Judicial Court*, Rescript.

If a judge of the Superior Court, after hearing a petition for a review of a final decree in a suit in equity, finds facts adverse to the allegations of the petition, such findings are not open to revision upon an appeal by the petitioner.

In a suit in equity in the Superior Court for the redemption of certain land from a mortgage, a final decree was entered, directing the defendant to convey the land to the plaintiff discharged from the mortgage and to pay to him a certain amount found due on an accounting for use and occupation of the land, and awarding costs to neither party. The defendant appealed. A rescript was sent by this court directing that the final decree be modified by giving to the defendant costs, and that the decree as thus modified was to stand. A judge of the Superior Court, on a motion by the plaintiff, amended the final decree by adding to the sum to be paid to the plaintiff an additional sum for further use and occupation of the land by the defendant since the previous decree. *Held*, that the rescript of this court was not a decree, but was an order for a decree, and that the Superior Court, under R. L. c. 173, § 48, had power so to amend the former decree as to determine as of the date of the final disposition of the suit the obligations of the defendant to the plaintiff in the matter involved in the suit.

RUGG, C. J. This is a petition for review of a judgment by way of final decree obtained against the petitioner by the respondent in a suit in equity brought by the latter as plaintiff to redeem land from a mortgage held by the present petitioner, defendant in the equity suit. The equity suit was heard upon its merits before a master, and upon an additional and subsequent issue by the

court. The petitioner alleges that the hearing before the master was had in the absence of certain of his material witnesses. But his course under such circumstances was to ask for a continuance under the well settled practice. No newly discovered evidence in its legal sense is alleged, and that which is referred to appears to have been merely cumulative. He further alleges a hearing without notice to him and his ability and intention if notified to have been present and produce evidence in his behalf. Upon all matters of fact the finding was adverse to the petitioner in the Superior Court. It is familiar law that such decision is not open to revision here.

In the suit in equity a final decree was entered in the Superior Court, ordering Day to convey to Mills the land in question discharged of the mortgage, to pay her \$795.66, being the amount found due upon accounting for use and occupation of the land, and awarding no costs to either party. From this decree Day appealed to this court. 206 Mass. 530. The material part of the rescript in accordance with that opinion was in these words:

"In the case of *Melissa L. Mills v. Epaphro A. Day* pending in the Superior Court for the county of Hampden: Ordered, that the clerk of said court in said county, make the following entry, under said case, in the docket of said court, viz.: The final decree is to be modified by giving the defendant costs and thus modified the decree confirming the master's report and the final decree are to stand." It was filed in October, 1910. The master's report brought the account down to 1908. In March, 1911, upon a motion by Mills and after a hearing, the Superior Court made a supplemental decree bringing the account between the parties down to that date, and charging Day with \$200 for the net rental of the land for 1909 and 1910. An amended final decree was entered, the first two paragraphs of which, touching the reconveyance of the land, the discharge of the mortgage and a declaration that the note had been paid, was in the language of the final decree appealed from in 206 Mass. 530, and a third paragraph, directing Day to pay to Mills a sum made up of the amount originally ordered paid and the \$200 found due by the supplementary decree, but containing no reference to costs.

The question is whether any error of law is presented in this record. Stated more specifically, it is whether, when in a suit in

equity an appeal to the full court is taken from a final decree entered in the Superior Court, a rescript, which directs a docket entry confirming certain parts of the decree and changing other parts is a decree of such a nature that the Superior Court has no further power over the case save to enter a decree in accordance with the terms of the rescript.

It was decided, after mature consideration, in *Merrill v. Beckwith*, 168 Mass. 72, that "the rescript of the full court directing a decree to be entered is an order for a decree, but not the decree itself." A docket entry or an order for a docket entry is not a final decree. *Plaisted v. Cooke*, 181 Mass. 118. This decision has been reaffirmed repeatedly. *Tyndale v. Stanwood*, 187 Mass. 531. *Crossman v. Griggs*, 188 Mass. 156, 160. The rescript in the case at bar required the entry of a new decree. This is not a case where this court itself prescribed the form of the final decree which should be entered. In such case no appeal would lie. *Nashua & Lowell Railroad v. Boston & Lowell Railroad*, 169 Mass. 157, 162. *United States v. New York Indians*, 173 U. S. 464, 472, 473, and cases there cited. It was the duty of the Superior Court in entering such new final decree to follow implicitly the principles of law laid down in the opinion upon which the rescript was founded. *Lincoln v. Eaton*, 132 Mass. 63, 69. *Attorney General v. New York, New Haven, & Hartford Railroad*, 201 Mass. 370, 371. Nor could it re-try questions of fact brought before this court on appeal in equity, where this court examines the evidence and decides the case according to its judgment.

These principles, however, do not prevent the Superior Court, in the exercise of its discretion and in the performance of its duty to see that justice is done, from taking such further proceedings as will adapt the decree finally entered to the needs of the case in order to adjust correctly the rights of the parties. The statute permitting amendments is very broad. R. L. c. 173, § 48. It applies as well to suits in equity as to actions at law. *Crease v. Babcock*, 10 Met. 525, 529. *Merchants Bank of Newburyport v. Stevenson*, 7 Allen, 489, 491. *King v. Howes*, 181 Mass. 445. The power to grant such amendments exists up to the time of the entry of final decree. It is a remedial statute, and in reason should be as broadly interpreted respecting suits in equity as in actions at law. See *West v. Platt*, 124 Mass. 353; *Childs v. Boston & Maine Rail-*

road, ante, 91. In the present case, Day having remained in possession of the mortgaged premises against the rights of the plaintiff in equity, it was necessary that his obligations in this regard should be determined at some time. It was more appropriate that they should be adjusted by the final decree in the pending suit in equity than that a new proceeding should have been brought therefor.

This decision in no wise conflicts with the settled principle "that after the entry of a final decree in equity, as after the entry of a final judgment in a suit at law, the case is finally disposed of by the court, subject to such rights of appeal, if any, as the statute gives, and the court has no further power to deal with the case except upon a bill of review." *White v. Gove*, 183 Mass. 333, 340. *Lakin v. Lawrence*, 195 Mass. 27. *Marshall Engine Co. v. New Marshall Engine Co.* 203 Mass. 410, 416. In the case at bar no amendment to the pleadings was allowed after rescript which changed the nature of the issues, or involved questions new or different in character from those tried and decided earlier. Nothing appears to have been tried which affected the order that Day was entitled to his costs. In the respect of failing to give costs to the defendant the final decree entered in the Superior Court did not conform to the terms of the rescript. In order to correct this error, review must be granted.

The decree must be reversed for the purpose of adding a paragraph awarding costs to Day, but in other respects must stand.

So ordered.

The case was submitted on briefs.

D. E. Webster, for the petitioner.

T. W. Kenefick, J. B. Carroll & W. H. McClintock, for the respondent.

ROBERT AYERS vs. HARRY F. RATSHESKY.

Suffolk. November 12, 13, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Of parent, Of child, In operating automobile. Practice, Civil, Conduct of trial. Evidence, Of identity. Witness, Impeachment.

The mother of a boy of average brightness, four years and ten months of age, living in a house without a yard on a short and narrow street principally occupied by automobile repair shops, is not negligent as matter of law in allowing her boy to go into the street with only such attention as she is able to give him by going to the window at reasonable intervals while engaged in her household duties, especially at an hour when the shops are closing and the streets are practically cleared.

A boy four years and ten months of age, who with two other children is in a shop opposite his home on a short and narrow street principally occupied by automobile repair shops, and with the other children is "chased" out of the shop by the man in charge and, running across the street at a speed of about four miles an hour, is struck when he nearly has reached the opposite sidewalk by an automobile moving at the rate of eighteen miles an hour without any horn being sounded, is not negligent as matter of law; nor would he have been negligent as matter of law if he and his companions in playing a game were running down a runway from the shop and he followed one of the other children across the street and was struck by the automobile when he nearly had reached the opposite sidewalk.

One, who at dusk drove an automobile at the rate of eighteen miles an hour without sounding a horn into a narrow and obstructed street where children were playing and ran into one of them, can be found to have been negligent.

A presiding judge properly may refuse to make a ruling based on a fragmentary portion of the evidence.

It seems, that, where a record of conviction of a crime is offered in evidence to impeach the credibility of a witness, the mere fact that the name of the person convicted is the same as that of the witness does not make the record admissible without corroborating evidence of identity.

At a trial of an action of tort for personal injuries from being run into by an automobile of the defendant by reason of the negligence of the defendant's servant who was driving the automobile, such driver being absent from the Commonwealth, an agreed statement of what his testimony would be was admitted in evidence. To impeach the credibility of such driver as a witness, the plaintiff offered in evidence the record of a conviction less than a year before the accident of a person of the same name for operating an automobile while under the influence of intoxicating liquor. In this record the person convicted was described as of the city in which the accident occurred, and the court in which he was convicted was near that city, and it appeared that the garage in which the automobile operated by the defendant's driver was kept was in

the same city. *Held*, that the circumstances shown combined with the identity of name warranted an inference that the court record applied to the defendant's driver, and accordingly that such record was admissible to impeach his credibility as a witness.

TORT for personal injuries sustained by the plaintiff on November 12, 1909, from being struck by an automobile of the defendant on Cambria Street in Boston. Writ in the Municipal Court of the City of Boston dated December 2, 1909.

On appeal to the Superior Court the case was tried before *Fox, J.* The material facts are stated in the opinion.

At the close of the evidence the defendant asked the judge to make, among others, the following rulings:

"1. On all the evidence the plaintiff cannot recover.

"2. There was no evidence that the plaintiff was in the exercise of due care."

"6. If the plaintiff, in the excitement of play, started and ran across the street, without looking or listening or taking any precautions to determine whether the street was then being used by other travellers, the plaintiff cannot recover in this action."

"9. To dodge or run rapidly into an approaching automobile while engaged in play without taking any precautions to ascertain the approach of vehicles or to avoid danger constitutes negligence as a matter of law."

"13. Upon all the evidence in this case the plaintiff's mother was not exercising due care for the protection of the plaintiff who was in her care, and her lack of care bars the plaintiff from recovering in this action."

The judge refused to make any of these rulings. In his charge to the jury the judge gave the following instruction regarding the record of conviction of "Herbert C. Brown of Boston," the admission of which in evidence is described in the opinion:

"And now I will refer to the record which has been introduced, showing that Brown has been convicted of crime — violation of the automobile laws. That record is introduced because, no matter how serious the offense is, conviction can be produced in evidence to impeach the veracity of a witness, and the testimony of Brown was admitted, as you remember it was admitted in the form of the affidavit of his counsel as to what he would testify to if he were here; and so his testimony is before you to weigh — it is

for you to determine what weight that testimony — what value you will place upon it; and in connection with that question you have the record of his conviction for some offense. That is the only purpose for which that was admitted."

The jury returned a verdict for the plaintiff in the sum of \$450. The defendant alleged exceptions to the refusal of his requests for the rulings quoted above, to the charge of the judge so far as it was inconsistent with the rulings so requested, and "to so much of the charge as authorized the jury to consider the record of conviction above mentioned as affecting the credibility of Herbert C. Brown; this objection was solely on the ground that the record had been wrongly admitted in evidence, it being conceded that this part of the charge was proper if the record was rightly admitted."

W. H. Hitchcock, for the defendant.

H. S. Davis, for the plaintiff.

RUGG, C. J. This is an action of tort to recover for personal injuries.

1. There was evidence tending to show that the plaintiff, who in November, 1909, was four years and ten months old, lived with his parents at 23 Cambria Street in Boston. He was a boy of average brightness and had attended kindergarten for several months. He had been out on the street most of the afternoon after two o'clock, his mother having warned him to keep on the sidewalk. She went to the window several times to watch him. About five o'clock he came into the house, but went out again, playing with two other children, and in a few minutes was injured by an automobile of the defendant driven by his servant. Cambria Street was short, mostly occupied by automobile repair shops, and about twenty feet wide between sidewalks, each of which was five feet wide. Many automobiles passed, and the plaintiff's mother testified that "before five o'clock there were generally quite a number of automobiles lined up along the sidewalk for repairs; just about five o'clock, when the shops were all closing, the streets were practically cleared." It was a question of fact whether on this evidence the mother was in the exercise of due care. It reasonably could not be expected that she should keep a boy of the plaintiff's years in the house continuously, and there was no yard or other place for him to go except into the high-

way. Nor could she be required constantly to watch him while out of doors. It was a narrow street, and although used much for automobiles, the conditions were such that she might anticipate fairly that they would not be driven at great speed. A boy of the plaintiff's years, intelligence and experience might be permitted by his parents under these circumstances to be upon the street without other attention than this mother was able to give by going to the window to look at reasonable intervals while about her household duties. Requests 1 and 13 of the defendant were denied rightly. *Sullivan v. Boston Elevated Railway*, 192 Mass. 37. *Ingraham v. Boston & Northern Street Railway*, 207 Mass. 451. *McNeil v. Boston Ice Co.* 173 Mass. 570.

2. There was evidence enough to support a finding that the plaintiff used such care as in reason could be expected of a child of his age under like conditions. There was testimony to the effect that he with two other children were in a shop across the street from his home when a man in charge "chased him out" and spoke to the children sharply, telling them with emphasis to leave the place. Thereupon, he with the others ran across the street, and when almost at the farther sidewalk was struck by the defendant's automobile. Other evidence would have supported the finding that the plaintiff with his companions in playing some game were running down a runway leading into the shop, and that he followed one of the others across the street, and was struck when he had nearly reached the opposite sidewalk. There was testimony that several automobiles were standing at the curb nearby. It was undisputed that he ran across the street, and his speed was estimated at about four miles an hour. There were various estimates of the speed of the automobile, the highest being eighteen miles an hour. One witness said that he did not think the horn of the automobile was blown as it came down the street. Under all these circumstances, the conduct of the plaintiff cannot be pronounced careless, as matter of law. The defendant's second request could not have been given. *Donovan v. Bernhard*, 208 Mass. 181. *Gray v. Batchelder*, 208 Mass. 441. *Lynch v. Fisk Rubber Co.* 209 Mass. 16. *Shapleigh v. Wyman*, 134 Mass. 118.

3. The negligence of the defendant's servant in charge of the automobile also was for the jury. The speed at which it was

driven, the narrow and obstructed street, the duskiness of closing day, the testimony that no horn was blown and other circumstances constituted substantial evidence in support of the proposition which the plaintiff was obliged to maintain. *Norris v. Anthony*, 193 Mass. 225. *Rogers v. Phillips*, 206 Mass. 308. *Banks v. Braman*, 188 Mass. 367.

4. No error is shown in the refusal to grant the sixth and ninth requests presented by the defendant. They related to fragmentary portions of the evidence with which the judge could not be required to deal specifically. The charge was comprehensive and accurate on the issues presented. *Bourne v. Whitman*, 209 Mass. 155, 164.

5. The defendant's chauffeur in charge of the automobile at the time of the accident, whose name was Herbert C. Brown, being absent from the Commonwealth at the time of the trial, by agreement a statement of what his testimony would be, if he were present, was read to the jury. Thereafter, against the objection and exception of the defendant, as affecting the credit to be given to this statement the plaintiff introduced in evidence a certified copy of the record of the District Court of Northern Norfolk, which showed that "Herbert C. Brown of Boston" was convicted on January 27, 1909, of operating an automobile while under the influence of intoxicating liquor and was fined \$25. There was no special evidence to identify the person mentioned in the record with the defendant's chauffeur other than whatever reasonable inference might be drawn from other facts. There is nothing in the record to indicate the residence of the defendant's chauffeur, except that his employer had a house in Brookline, and that he himself was the driver of an automobile kept at a garage in Boston. The statement has been made broadly that identity of name is sufficient evidence to warrant the inference of identity of person.* In many, if not all of these cases, there will be found facts which supplement the identity of name as ground for drawing the in-

* *Hatcher v. Rocheleau*, 18 N. Y. 86, 92, 96. *State v. Court*, 225 Mo. 609, 615. *State v. Le Pître*, 54 Wash. 166. *Boyd v. State*, 150 Ala. 101. *State v. Loser*, 132 Iowa, 419, 426. *Bayha v. Mumford*, 58 Kans. 445. *Colbert v. State*, 125 Wis. 423. *State v. Lashus*, 79 Maine, 504. *Regina v. Levy*, 8 Cox C. C. 73. *Sewell v. Evans*, 4 Q. B. 626. *Clifford v. Pioneer Fire-Proofing Co.* 232 Ill. 150, 154. 16 Cyc. 1055, and cases there collected.

ference that the same person is meant. That is true of *Dolan v. Mutual Reserve Fund Life Association*, 173 Mass. 197, and *Commonwealth v. Hollis*, 170 Mass. 433. In *Commonwealth v. Norcross*, 9 Mass. 492, it was said respecting identity of name in a certificate of marriage with one charged in the indictment that testimony was necessary "to prove the identity of parties." In *Commonwealth v. Briggs*, 5 Pick. 429, it was held that identifying evidence was required. See also *Wedgwood's case*, 8 Greenl. 75; *Snowman v. Mason*, 99 Maine, 490; *Mooers v. Bunker*, 29 N. H. 420, 431; *Stebbins v. Duncan*, 108 U. S. 32, 47.

In *Bogue v. Bigelow*, 29 Vt. 179, 183, identity of name was held *prima facie* evidence of identity of person in tracing title to real estate, but it was said by Redfield, C. J., that "in cases involving a charge of crime, when presumptions of innocence are allowed to prevail over presumptions of identity from mere identity of names, some further proof is often required." It has been held by the weight of authority that where previous conviction of a crime is an essential element of a crime charged, mere identity of name is not enough to sustain the burden of proof beyond reasonable doubt. *State v. Adams*, 64 N. H. 440. *People v. Price*, 2 N. Y. Supp. 414, 416, affirmed on opinion below in 119 N. Y. 650. *State v. Smith*, 129 Iowa, 709. *Bandy v. Hehn*, 10 Wyo. 167, 174. Russ. on Crimes, (7th Eng. ed.) 2135 and cases cited.

The good name of a witness is precious to him. It is important in the administration of justice that his credibility should not be made the subject of adverse comment without some foundation in evidence. In the light of our decisions and of these principles, bald identity of name without confirmatory facts or circumstances is not enough to indicate identity of person. But in the case at bar such facts and circumstances were present. The record was of a crime which could have been committed in all probability only by one competent to operate an automobile, a class few in number compared with the entire population, but to which the defendant's employee belonged. The person convicted was described as of Boston, and the offense was committed and the conviction had in the vicinity of Boston, within less than a year before the accident in question, which occurred in Boston and near a garage where the automobile operated by the defendant's servant was kept. It would have been a warrantable conclusion

that the defendant's chauffeur lived in or near Boston. These circumstances together with identity of name were enough to warrant an inference that the court record applied to the defendant's servant.

Of course it was an inference of fact which the jury alone could draw. But the only exception saved was to the admission in evidence of the copy of the record, and it is conceded expressly in the exceptions that "the charge was proper if the record was rightly admitted."

Exceptions overruled.

FLORA M. MORSE vs. NEWTON STREET RAILWAY COMPANY.

Middlesex. November 13, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway, Protection from crowd. Carrier, Of passengers.

A street railway company is liable for an injury to a passenger on one of its cars caused by its failure to take reasonable precautions to guard the passengers from the rushing of a waiting crowd to board the car at a time and place when such action of the crowd ought to have been anticipated.

In an action against a street railway company for personal injuries from being pushed by a crowd from an open car of the defendant on which the plaintiff was a passenger, there was evidence that it was the week of a Grand Army encampment in a neighboring city and that for the night when the accident happened the defendant had advertised a river carnival, for which it was running many extra cars, that, when the car in which the plaintiff was travelling arrived at a certain square, there was a crowd there of four or five hundred persons "all around and close up to the car," that the people rushed into the car before it came to a stop and began to turn over the seats, that there was no guard rail on either side of the car and the crowd rushed upon the car and boarded it from both sides, and that the plaintiff, as she was rising from her seat, was pushed from the car and injured, that the accident happened between eight and half past nine o'clock in the evening, that there had been an unusually large crowd in the square since seven o'clock and that the same kind of rushing upon the cars had been going on since that hour, that there was only one policeman on duty at the square and no employee of the defendant except the motorman and the conductor of the car, neither of whom made any effort to protect the passengers or to restrain the crowd. *Held*, that it was a question for the jury whether the defendant did all that it ought to have done to guard its passengers in the light of its knowledge of the crowds likely to be travelling on that evening and their probable impatience and disorder and considering the length of time during which it might have been found that people had been rushing upon the cars.

TORT for personal injuries sustained by the plaintiff from being pushed by a crowd from an open electric street car of the defendant on which the plaintiff was a passenger at Watertown Square in Watertown on the evening of August 17, 1904. Writ dated October 31, 1904.

In the Superior Court the case was tried before *Dana, J.* The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the defendant was not liable. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$800. The defendant alleged exceptions.

P. F. Drew, for the defendant.

E. Carr, for the plaintiff.

Rugg, C. J. The plaintiff seeks to recover compensation for personal injuries received by her because of being crowded off a car of the defendant, upon which she was a passenger, on an August evening, by the sudden rushing upon it of a large number of persons. She was travelling from Waltham to Boston, and, although the car usually went through to Boston, on that day the defendant had changed its schedule, and passengers were required to change at a public square in Watertown which was made the end of the line for the time being. This square was the terminus of lines of street cars from Boston, Needham and parts of Newton. It was the week of a Grand Army encampment in Boston, and a river carnival advertised by the defendant was being held that night in Waltham. On this account the defendant was running many extra cars. There was evidence tending to show that an unusually large crowd was in the square, which began to gather about seven o'clock and which was continually changing as people, brought on other lines of street cars, waited to be taken away on those of the defendant; that between eight and half past nine o'clock, as the open car on which the plaintiff was riding with a few passengers came into the square, and as she was rising from her seat, there was a crowd estimated at four or five hundred "all around and close up to the car." People rushed into this car before it came to a stop, and began to turn over the seats, and pushed the plaintiff from the car. There were no guard rails on either side of the car, and people boarded it from both sides.

They were pushing and crowding and rushing on to the car, and it might have been found that this course of conduct had been going on since seven o'clock that evening. There was one policeman on duty at the square, but no employee of the defendant except its motorman and conductor, neither of whom made any effort to protect its passengers or to restrain the crowd. This narration might have been found to be correct in substance, although there was ample evidence tending to show that the people were entirely orderly.

This was enough to make it a question for the jury, whether the defendant did all that it ought to have done in the performance of its duty to guard its passengers in the light of its knowledge of the crowds likely to be travelling and their probable impatience and disorder and the length of time during which it might have been found that there had been thronging and pressing. The governing principles of law are well settled, and recently have been restated at length. *Glennen v. Boston Elevated Railway*, 207 Mass. 497. This case and *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341, *Kelley v. Boston Elevated Railway*, 210 Mass. 454, and *Coy v. Boston Elevated Railway*, 212 Mass. 307, govern the case at bar. The evidence which has been stated and which the jury may have found to be true distinguishes it from *Willworth v. Boston Elevated Railway*, 188 Mass. 220, *McCumber v. Boston Elevated Railway*, 207 Mass. 559, and *Marr v. Boston & Maine Railroad*, 208 Mass. 446, especially relied on by the defendant.

Exceptions overruled.

DAVID W. NOYES & another vs. WILLIAM H. MEHARRY & another.

Suffolk. November 14, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Deceit. Theatre. Evidence, Materiality.

In an action for alleged false and fraudulent representations in regard to the net profits from the business of a moving picture theatre whereby the plaintiff was induced to purchase the business, if there is evidence that the defendant told the plaintiff that the net profits of the business were about \$1,000 a month and displayed to the plaintiff books which showed nearly that amount of profit, which books, although called for by the plaintiff, the defendant failed to produce at the trial, that while the negotiations for the purchase were in progress the defendant for the purpose of influencing the plaintiff procured a fictitious attendance at the theatre through an extensive distribution of free tickets, and that the net profits were in fact very much less than \$1,000 a month, the questions whether the representations made by the defendant were false and fraudulent and whether the plaintiff relied upon them are for the jury.

It is not the tendency of the law to-day to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk. By RUGG, C. J.

In an action for alleged false and fraudulent representations in regard to the net profits of the business of a moving picture theatre whereby the plaintiff was induced to purchase the business, it cannot be said, as matter of law, that the fullest opportunity to examine a moving picture theatre would demonstrate the truth or falsity of statements as to the net profits derived from it.

In an action for alleged false and fraudulent representations in regard to the net profits of the business of a moving picture theatre whereby the plaintiff was induced to purchase the business, where the plaintiff has introduced evidence that while the negotiations for the purchase were in progress the defendant for the purpose of influencing the plaintiff procured a fictitious attendance at the theatre through an extensive distribution of free tickets, the plaintiff may testify that immediately after the purchase the attendance at the theatre fell off, this having a tendency to show the extent of the fictitious stimulation of patronage by the defendant just before the sale.

TORT for deceit in the sale of the business and fixtures of a moving picture theatre at 147 and 149 Court Street in Boston, which the plaintiffs alleged that they on April 27, 1908, were induced to buy by false and fraudulent representations of the defendants. Amended from a bill in equity which was inserted in a common law writ dated May 20, 1908.

In the Superior Court the case was tried before *Wait, J.* The evidence is described in the opinion. At the close of the evidence

the defendants asked the judge to rule that the plaintiffs were not entitled to recover. The judge refused to make this ruling, and submitted the case to the jury, who returned a verdict for the plaintiffs in the sum of \$4,323.09. The defendants alleged exceptions to the refusal of the ruling requested by them, and other exceptions relating to the admission and exclusion of evidence, which are described in the opinion.

Leo Grover, mentioned in the opinion, was the son of one of the defendants and was called by the defendants as a witness. He testified that he was employed in the theatre for about one year and that after the sale of the theatre he remained in the employ of the plaintiffs until the theatre was closed. He was asked on his direct examination the question, "How were the shows as compared with the shows run there before they [the plaintiffs] took the theatre?" The plaintiffs objected to the question, and the witness answered, "Why, very poor, in my estimation." The judge ordered that the question and answer should be stricken out, and the defendants excepted.

T. J. Shea, for the defendants.

C. T. Cottrell, for the plaintiffs.

RUGG, C. J. This is an action for deceit in the sale of a theatre. The defendants' first contention is that a verdict should have been directed in their favor. There was evidence tending to show that one of the defendants told the plaintiffs that the net profits from the business were about \$1,000 per month, and that books represented to be books of account of this business were displayed to the plaintiffs, which showed nearly that amount of profit. These books, although called for by the plaintiffs, were not produced by the defendants at the trial, and it well might have been found that faint efforts to that end had been made by the defendants. There was evidence also that while negotiations for the purchase were in progress, a fictitious attendance at the theatre for the purpose of influencing the plaintiffs was procured by the defendants through a somewhat extensive gratuitous distribution of admission tickets. One of the defendants testified to figures of receipts and expenditures and profits from which it might have been found that the net profits were very much less than \$1,000 per month. It is not necessary to narrate the evidence more in detail. It is plain that enough has been recited to support a finding of

fraudulent misrepresentations by the defendants. It is not the spirit of the law of to-day to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk. *Mabardy v. McHugh*, 202 Mass. 148.

The question whether the plaintiffs relied upon the representations of the defendants or upon their own investigations was for the jury. It cannot be said, as matter of law, that the fullest opportunity to examine a moving picture theatre would demonstrate the truth or falsity of statements as to its net profits. Upon this point the case is well within established principles and adjudications of this court. *Thomson v. Pentecost*, 206 Mass. 505, 511. *Townsend v. Niles*, 210 Mass. 524, 530.

No error is shown in the rulings respecting the admission of evidence. The natural conditions affecting attendance at theatres of this sort were similar enough to render competent the testimony of one of the plaintiffs as to the falling off immediately after the purchase. It bore directly upon the degree of fictitious stimulation of patronage by the defendants just before the sale. The defendants do not show that they have been harmed by the exclusion of testimony as to receipts before January, 1908, because no offer of proof was made. *Cook v. Enterprise Transportation Co.* 197 Mass. 7. But beyond that the judge may have thought it too remote, and it was before the defendant Meharry was interested in the theatre and while its ownership was different. Hence it did not relate to the misrepresentation in issue.

The judge may have found that the witness, Leo Grover, was not an expert, and on that ground not qualified to give testimony as to the character of the shows presented by the defendants. Moreover, what he thought about them was of no consequence.

The other exception in regard to evidence has not been argued, and might be treated as waived. But it is too plain for discussion that the ruling was right.

Exceptions overruled.

JAMES F. DOOLEY & another vs. ARTHUR E. BEANE.

Suffolk. November 18, 1912. — February 25, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Indorser of writ. *Writ*, Indorser of.

In an action in which the plaintiff is an inhabitant of the Commonwealth the signature of the plaintiff's attorney under the words "From the office of" on the back of the writ is not an indorsement of the writ making the attorney liable for costs under R. L. c. 173, § 39, and such signature does not become an indorsement if the plaintiff after the action is brought and while it is pending removes from the Commonwealth. In case of such removal, if the defendant wants an indorser of the writ, he must ask for one under § 41 of the statute, unless the court of its own motion has required the plaintiff to procure such an indorser.

SCIRE FACIAS, against an attorney at law, on an execution for costs issued in favor of the plaintiffs as the defendants in an action at law in which one Charles W. Morris was the plaintiff and in which the defendant in *scire facias* was alleged to be the indorser of the writ. Writ of *scire facias* dated May 4, 1911.

In the Superior Court the case was submitted to Pratt, J., upon an agreed statement of facts, presenting the facts which are stated in the opinion. The judge ordered judgment for the plaintiffs in the sum of \$68.46; and from the judgment so ordered the defendant appealed.

E. A. Howes, Jr., for the defendant.

T. H. Dowd, for the plaintiffs.

RUGG, C. J. This is a *scire facias* brought against the defendant to recover from him costs on the ground that he was indorser of the writ for costs. The agreed facts are that the defendant, who is an attorney at law, brought an action, in which Davis B. Keniston, Jr., then and continuously since a resident of Boston, was the plaintiff, and in which the present plaintiffs were the defendants. This action was entered in the Municipal Court of the City of Boston in 1908, and upon the back of the writ was written, "from the office of Arthur E. Beane." In February, 1909, upon motion, Charles W. Morris, a resident of Massachu-

setts, was substituted as plaintiff. Judgment was entered for the plaintiff in the Municipal Court, and the defendants appealed to the Superior Court, in which the case was entered in April, 1909. Charles W. Morris continued to be a resident of this Commonwealth until after the trial of the action in the Superior Court, in which he testified, but before final judgment was entered for the defendants he removed from and ceased to be a resident of this Commonwealth. At no time during the pendency of the action of Morris v. Dooley did the defendants move for an indorser for costs, nor was it ever ordered that the plaintiff in that action should furnish such an indorser. The question is whether upon these facts the defendant Beane was an indorser for costs.

The statute requires that in an action at law, in which the plaintiff is not an inhabitant of this Commonwealth, the writ shall before the entry be indorsed by an inhabitant of the Commonwealth, who shall be liable for costs. R. L. c. 173, § 39. It has been held many times under this statute and preceding similar enactments that an indorsement "from the office of" and followed by the name of the attorney is an indorsement for costs. *Johnson v. Sprague*, 183 Mass. 102, and cases cited. When the plaintiff after the commencement of an action ceases to be a resident of the Commonwealth, "the court, upon motion of any other party, shall, and of its own motion may, require the plaintiff to procure a responsible indorser." R. L. c. 173, § 41. At the time the writ in the original action was entered there was no reason for an indorser. Indeed, an indorser for costs could not have been ordered. *Shute v. Bills*, 198 Mass. 544. There is nothing in the agreed facts to show that Mr. Beane had any ground to suppose that the occasion ever would arise when the defendants could move for an indorser for costs. Plainly, therefore, his signature upon the back of the writ could not have been made with any intent or expectation to be bound for costs. His conduct since has not misled the original defendants to their harm. It is only in the comparatively rare instances where the plaintiff is a non-resident that an indorsement like that made upon the writ in the original action is or can be supposed to have been made with any thought of liability for costs. It has other purposes of identification and information which are well recognized and are quite apart from legal liability for costs. A widespread custom directed to other ends

ought not to be stretched to include an unusual and unanticipated liability, unless demanded by some rule of law or by manifest justice. The authorities do not go to the extent of holding the attorney liable under circumstances like these. The statute gives ample opportunity to a defendant to secure an indorser of a writ in which the plaintiff has removed from the Commonwealth, and no injustice can be done him by holding him to the terms of the statute. One strong reason why an attorney indorsing the writ of a non-resident plaintiff should be held for costs is that he must be presumed to know that such a writ cannot be legally entered in court without such an indorser. That reason fails wholly in a case like the present. An action brought by a resident plaintiff may lawfully be continued in court, even though the plaintiff should remove from the Commonwealth, unless the defendant or the court requires an indorser. Writing the name of the attorney on the back of the writ ought not to be held as assumption of a liability not contemplated by the parties and not required by the statute or by any action of the court.

Judgment reversed.

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ABANDONMENT.

Abandonment by a railroad company of its location or of any part thereof is not to be inferred from mere non-user. *New York Central & Hudson River Railroad v. Chelsea*, 40.

ABORTION.

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman, in consequence of which she died, the statements made by the woman to her attending physician of her bodily ailments and symptoms, for the purpose of enabling him to give proper medical advice and treatment by forming an opinion as to the cause of such ailments and symptoms, are admissible in evidence. *Commonwealth v. Smith*, 563.

At such a trial, certain dying declarations of the woman, wherein she used the word "abortion" in referring to the defendant's act, were held to be admissible under R. L. c. 175, § 65. *Ibid.*

Whether at such a trial a statement by the woman to her attending physician, not made as a dying declaration under R. L. c. 175, § 65, that an abortion recently had been performed upon her, is admissible in evidence against an exception of the defendant, was referred to as a doubtful question under the decision in *Commonwealth v. Sinclair*, 195 Mass. 100. *Ibid.*

ACTIONS, SURVIVAL OF.

See SURVIVAL OF ACTIONS.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE USE.

A finding, that no abutter on a certain railroad location had gained any rights therein by adverse use, was held to have been warranted in a suit by a railroad company to establish its rights in the location. *New York Central & Hudson River Railroad v. Chelsea*, 40.

In a suit in equity to restrain the defendant from interfering with the plaintiff's use of a certain spring surrounded by land of the defendant and conveyed by the defendant's predecessor in title in fee to the plaintiff's prede-

Adverse Use (*continued*).

cessor in title, it appeared that the defendant and his predecessor in title had used the spring continuously for more than thirty years but that the quantity of water thus used was much less than the capacity or normal flow of the spring, and it was held that the prescriptive right to draw water from the spring acquired by the defendant was measured by the amount of water actually withdrawn, and that no title to the entire spring was acquired. *Tinker v. Bessel*, 74.

AGENCY.

Existence of Relation.

A draw tender was held not to be an agent of a town. *Hawes v. Milton*, 446. Case in which certain acts of a husband were held to have been done as agent for his wife. *Daw v. Lally*, 578.

The appointment on Sunday of an agent to execute on Monday a contract to sell certain land is void as the transaction of secular business on the Lord's day. *Kryzminski v. Callahan*, 207.

Where the servant of one employer is assisting the servant of another in doing certain work, in order to make such assistant the servant of the person whose work he is doing it is necessary either that he should assent expressly to a change of employers or that he should have had such notice and knowledge of the circumstances that his assent to the changed relations is to be presumed from his conduct as a matter of law. *Sprague v. General Electric Co.* 375.

Application of the foregoing principle in an action for personal injuries where it appeared that the plaintiff was hit by the head of a hammer which came off the handle when, in accordance with a general instruction of his employer and at the request of an electrical engineer of the defendant, who was installing an engine in a power house of the plaintiff's employer, he was assisting such engineer in tightening a bolt. *Ibid.*

And in the same action it was held that the question, whether the plaintiff when assisting in tightening the bolt became a servant of the defendant so that his injury was caused by the act of a fellow servant, was one to be submitted to the jury with proper instructions. *Ibid.*

And also that, under the circumstances shown, the authority of the defendant's servant to ask the plaintiff for temporary assistance fairly could be presumed, and that, in rendering such assistance for the purpose of facilitating the work of his employer, the plaintiff did not cease to be the servant of such employer or lose his right to be protected from the carelessness of the defendant's servants. *Ibid.*

In a certain action under the employers' liability act against a corporation for causing the death of one of its workmen, it was held to be no defense that, after the employment of such workman and before the accident which caused his death, the defendant had transferred to another corporation the business in which the workman was employed, if the deceased workman had no knowledge of a change in his employer and was not put upon inquiry in regard to such change. *Beauregard v. Benjamin F. Smith Co.* 259.

The transfer of certain shares of the capital stock of a corporation by the owner to a person who signed a certain memorandum, was held not to constitute such person a trustee, and such person was held to be merely an agent for the owner, so that an attempted gift by the owner in accordance with the

memorandum to another person to take effect after the death of the owner was void, and the executor of the will of the owner was entitled to the shares. *Russell v. Webster*, 491.

Execution, by a woman about to undergo a surgical operation which she believed she would not survive, of an assignment of a savings bank deposit to her stepson, and delivery of the bank book and assignment to an attorney at law to be sent to the stepson in case of her death, was held not to constitute a *donatio causa mortis*, in case of the woman's death, where it was understood between the woman and the attorney that he was to hold the documents as her agent and not as the agent of the stepson. *Stratton v. Athol Savings Bank*, 46.

In an action against a railroad corporation by the indorsee of a bill of lading for the loss of a part of the goods in transit, for which the plaintiff sought to hold the defendant liable as the last carrier, it was held that there was evidence warranting a finding that the defendant was the last carrier, and that another carrier in whose yard the rest of the goods were delivered to the plaintiff was the defendant's agent to haul the car to that yard, the use of which the defendant had hired for the delivery of the goods. *Shapiro v. Boston & Maine Railroad*, 70.

At the trial of an action against a corporation for personal injuries alleged to have been caused by the plaintiff being run over by a team driven by a servant of the defendant, the only evidence offered by the plaintiff to show that the driver of the team was a servant of the defendant acting within the scope of his employment was some slight oral testimony and answers of the defendant's treasurer to interrogatories propounded to him by the plaintiff, and it was held that the oral testimony, taken in connection with the substance and the evasive character of the answers to the interrogatories, where it was within the treasurer's power to answer fully, warranted a finding that the driver was a servant of the defendant and was acting within the scope of his employment. *D'Addio v. Hinckley Rendering Co.* 465.

Invalidity of Appointment on Lord's Day.

The appointment on Sunday of an agent to execute on Monday a contract to sell certain land is void as the transaction of secular business on the Lord's day. *Kryzminski v. Callahan*, 207.

Scope of Authority or Employment.

It is not within the scope of the employment of a brakeman on a freight train, which is in charge of a conductor, to eject from the train a trespasser who is stealing a ride. *Harrington v. Boston & Maine Railroad*, 338.

If oiling or cleaning a certain machine is necessarily incident to its operation, an employee set to work upon it is acting within the scope of his employment in oiling and cleaning it. *Dagis v. Walworth Manuf. Co.* 524.

At the trial of an action for personal injuries caused by the plaintiff being run into by an automobile of the defendant, it was held that the jury on the evidence would have been warranted in finding that the use of the automobile by the driver at the time of the accident, in going from the place where he took his meals to get his laundry at another place, was incident to his employment or was permitted or assented to either expressly or im-

Agency (continued).

plied by those having authority from the defendant. *Reynolds v. Denholm*, 576.

A man employed to take care of horses and a carriage, one of whose ordinary duties is to drive the horses in transporting the wife or daughters of his employer whenever required by any one of them to do so without further direction of his employer and even without his knowledge in the particular instance, while thus driving the horses attached to the carriage at the request of one of the daughters is acting within the scope of his employment. *Leonard v. Stevens*, 302.

One who, while helping a teamster to unload to a wagon bricks from a car in a railroad freight yard, rests on the car between wagon loads, may be found to be acting within the scope of his employment while so resting and to be in the yard by an implied invitation of the railroad corporation. *Griswold v. Boston & Maine Railroad*, 12.

At the trial of an action against a corporation for personal injuries alleged to have been received by being run over by a team driven by a servant of the defendant, the only evidence offered by the plaintiff to show that the driver of the team was a servant of the defendant acting within the scope of his employment was some slight oral testimony and answers of the defendant's treasurer to interrogatories propounded to him by the plaintiff, and it was held that the oral testimony, taken in connection with the substance and the evasive character of the answers of the interrogatories, where it was within the treasurer's power to answer fully, warranted the finding that the driver was a servant of the defendant and was acting within the scope of his employment. *D'Addio v. Hinckley Rendering Co.* 465.

Agent's Duty of Fidelity.

Where a paid agent of the mortgagee in an unrecorded mortgage of personal property, after the mortgagee has taken possession under the mortgage, has been placed in possession thereof for him and is induced to break faith with his employer and to hold possession for the mortgagee in another unrecorded junior mortgage, the rights of the agent's first principal are not affected. *Keepers v. Fleitmann*, 210.

ANNULMENT OF MARRIAGE.

Where a statute of another State provides that "any marriage contracted by a person below the age of consent . . . may in the discretion of" a certain court of that State "be annulled at the suit of the party who at the time of contracting such marriage was below the age of consent," a marriage contracted in that State between parties, one of whom was below the age of consent, if it is not in violation of R. L. c. 151, §§ 1-5, is valid here until it has been annulled by a court of the State where it was solemnized, and the Superior Court of this Commonwealth has no jurisdiction of a petition for annulment of such a marriage. *Levy v. Downing*, 334.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT.

ARREST.

Where an officer, after arresting a person without a warrant upon reasonable cause to believe that he had committed a felony, is satisfied that his suspicions were unfounded, he is not required to make a formal complaint under oath, but does his duty by bringing the prisoner before the proper magistrate and laying before that magistrate a full statement of the facts. *Keefe v. Hart*, 476.

When a police officer has arrested a person without a warrant upon probable cause to believe that such person has committed a felony, it is his duty to bring the prisoner before a court or magistrate as soon as reasonably is possible, and he has no right to detain the prisoner for the purpose of making a further investigation of the charge against him. *Ibid.*

ASSESSMENT.

See TAX.

ASSIGNMENT.

For Benefit of Creditors.

Liability of the assignee for the benefit of the creditors of the maker of a promissory note, after he has acknowledged that there is a dividend due to the person entitled to the proceeds of the note and all parties interested have interpleaded in an action against him. *Nelson v. Piper*, 531.

By Married Woman.

Money lent by a woman, as the administratrix of an estate, to a man whom she afterwards marries may be recovered from her husband by one to whom she has assigned the claim after her marriage. *Delval v. Gagnon*, 203.

By Client to Attorney.

In a suit in equity against an attorney at law an assignment of a life insurance policy by the plaintiff to the defendant was held to have been made, not as security for a loan, but absolutely. *Manheim v. Woods*, 537.

Of Non-negotiable Note.

One who receives from the holder an attested overdue non-negotiable promissory note, bearing an indorsement making it payable to the order of such recipient, takes it as an assignee and may bring an action against its maker for his own benefit in the name of the payee, although the payee forbids him to do so. *Pierce v. Talbot*, 330.

Of Savings Bank Deposit.

Execution, by a woman about to undergo a surgical operation which she believed she would not survive, of an assignment of a savings bank deposit to her stepson, and delivery of the bank book and assignment to an attorney at law to be sent to the stepson in case of her death, were held not to constitute. 213.

Assignment (continued).

tute a *donatio causa mortis*, where it was understood between the woman and the attorney that he was to hold the documents as her agent and not as the agent of the stepson. *Stratton v. Athol Savings Bank*, 46.

ATTEMPT TO COMMIT LARCENY.

In an indictment for an attempt to commit larceny from the person of a person unknown by stealing property in his pocket, it is not necessary to describe the property attempted to be stolen or to allege its value, or to aver that the person unknown had anything in his pocket which could have been the subject of larceny. *Commonwealth v. Cline*, 225.

Upon an indictment for an attempt to commit larceny from the person, it is proper to deny a motion for a bill of particulars which asks only for a description of the property attempted to be stolen, this not being essential to the offense charged. *Ibid.*

A sentence of eighteen months in the house of correction for an attempt to commit larceny from the person was held to have been authorized under R. L. c. 215, § 6, cl. 4, and c. 208, § 24. *Ibid.*

Numerous exceptions, which were designated by this court as without merit, relating to the admission of evidence at a trial for an attempt to commit larceny from the person. *Ibid.*

ATTORNEY AT LAW.

Duty and Liability to Client.

Where a woman client of an attorney at law employs him to attend a foreclosure sale of real estate and to purchase the property in her name, and he purchases and holds the property for himself, he holds the property as a constructive trustee for her and can be compelled to account to her in a suit in equity. *Rolikatis v. Lovett*, 545.

In such a suit the defendant is not entitled to interest on the amount of the price paid by him for the real estate. *Ibid.*

Suit in equity against an attorney at law seeking that an absolute assignment to the defendant of a policy of insurance upon the plaintiff's life be declared to have been an assignment for the purpose of securing a loan and praying for an accounting and a redemption of the policy, in which it was held that the defendant had sustained the burden, which was upon him, of proving that the assignment was absolute and fairly and honestly consummated. *Manheim v. Woods*, 537.

Client's Liability to Attorney.

An attorney at law, who is employed by a co-operative bank as its attorney for a year to perform the duty of examining the titles to land offered to the bank as security for loans to be made to applicants, by whom the attorney is to be paid for his services, such earnings amounting to about \$1,300 a year, is not bound to account to the bank for his time, and, if he is discharged wrongfully by the bank shortly after the beginning of the year for which he was employed, in an action by him against the bank for its breach

of contract the damages to which he is entitled are not to be diminished by reason of his earnings from additional work undertaken by him after his wrongful discharge by the defendant. *Dixon v. Volunteer Co-operative Bank*, 345.

An agreement made by the plaintiff in an action of tort for conversion, who has obtained a verdict on which no judgment has been entered, with the attorney at law who conducted the case, that the proceeds of the judgment should be taken by the attorney on account of such plaintiff's indebtedness to him for services and disbursements in that and other litigation, was held to create as between the parties a right in the nature of a lien enforceable in equity, so that the claim upon the verdict could not be reached and applied by a suit under R. L. c. 159, § 3, cl. 7, to the payment of a debt due to another creditor of such plaintiff. *Delval v. Gagnon*, 203.

Disbarment.

R. L. c. 165, § 44, authorizing the removal of an attorney at law for deceit, malpractice or other gross misconduct, is constitutional. *Boston Bar Association v. Casey*, 549.

The decisions of this court in *Boston Bar Association v. Casey*, at previous stages of that case as reported in 196 Mass. 100 and 204 Mass. 331, here were affirmed. *Ibid*.

AUTOMOBILE.

Registration and Rights on Highway.

Under St. 1909, c. 534, §§ 2, 9, if the owner of an automobile which is not registered in his name operates it upon a highway, he is there unlawfully, and a street railway company in operating its cars upon the highway owes him no other duty than to abstain from injuring him by wantonness or recklessness. *Love v. Worcester Consolidated Street Railway*, 137.

One driving on a public highway an automobile which is not registered or to be "regarded as registered" in accordance with the provisions of the statutes, is a trespasser, and cannot maintain an action for personal injuries caused by a defect in such highway. *Holland v. Boston*, 560.

In an action against a city for personal injuries alleged to have been sustained by reason of a defect in a highway when the plaintiff was driving an automobile which he owned but which was not registered, it was held that the question, whether the automobile was controlled by a dealer in automobiles, by whom the plaintiff was employed, and bore his general distinguishing number or mark so as to be "regarded as registered" under the provisions of St. 1907, c. 580, § 2, was for the jury. *Ibid*.

In such an action, evidence that the plaintiff had not procured the license to operate an automobile, required then by Sts. 1903, c. 473, §§ 4, 5; 1905, c. 311, § 4, is evidence of negligence, but does not necessarily preclude his recovery. *Ibid*.

Statutes as to Driving.

The provision of R. L. c. 54, § 2, that "the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way,"

Automobile (continued).

applies to the driver of an automobile who is attempting to pass a street railway car travelling in the same direction. *Foster v. Curtis*, 79.

At the trial of an indictment under St. 1909, c. 534, § 22, for operating an automobile recklessly, a statement in the charge of the judge to the effect that automobiles must be used very much as other vehicles must be used and that the driver's duty is to look out for persons and other vehicles on the highway is correct. *Commonwealth v. Horsfall*, 232.

At the same trial, an instruction, that the care which the driver of an automobile must exercise "is proportionate to that instrumentality or engine which he has in charge," even if not expressed with precise technical accuracy, is correct in substance. *Ibid.*

Proper refusal of a judge, presiding at the trial of an indictment for operating an automobile recklessly, to rule that, if, after it first was possible for the defendant to see a woman whom the automobile struck, he did everything that was possible to avert the accident, he could not be found guilty. *Ibid.*

Upon an indictment under R. L. c. 534, § 22, against the driver of an automobile for knowingly going away without stopping and making himself known after causing injuries to person and to property, the defendant cannot be said "knowingly" to have failed to perform the requirements of the statute if after causing the injuries he sent back from the place where his automobile stood disabled by the collision a messenger with instructions to tell his name and residence, and supposed that the messenger had done this although in fact he had not. *Ibid.*

Use of Private Way.

Construction of a deed granting a private right of way, where it was held that the grantee was entitled to drive an automobile upon the way. *Crosier v. Shack*, 253.

Liability of Owner for Acts of Driver.

At the trial of an action for personal injuries caused by the plaintiff being run into by an automobile of the defendant, it was held that the jury on the evidence would have been warranted in finding that the use of the automobile by the driver in going for his laundry was incident to his employment or was permitted or assented to by persons having authority from the defendant. *Reynolds v. Denholm*, 576.

AUTREFOIS ACQUIT.

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance during the same period of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

BAILMENT.

When one, who receives bonds in pledge from another to whom they had been entrusted by their owner for safe keeping, is liable for conversion, see *Varney v. Curtis*, 309.

BANKRUPTCY.

At the trial of an action of contract upon a judgment the only question at issue was, whether the plaintiff had actual notice of bankruptcy proceedings of the defendant, and an exception of the defendant to the exclusion of a record of poor debtor proceedings instituted before the bankruptcy proceedings, showing a large number of short continuances, was overruled because it appeared that the judge permitted the defendant to introduce other evidence as to everything that took place in the poor debtor proceedings, so that, even if the exclusion of the record was erroneous, the defendant was not shown to have been harmed. *Currier v. MacDonald*, 363.

BILLS AND NOTES.

Non-negotiable.

A promissory note, secured by a mortgage, is not negotiable if it is payable in three years from its date "with the privilege of anticipating payment upon said sum in whole or in part at any time." *Pierce v. Talbot*, 330.

One who receives from the holder an attested overdue non-negotiable promissory note, bearing an indorsement making it payable to the order of such recipient, takes it as an assignee and may bring an action against its maker for his own benefit in the name of the payee, although the payee forbids him to do so. *Ibid.*

Attested.

Action by the assignee of an attested overdue non-negotiable promissory note is not barred under the provisions of R. L. c. 202, § 1, cl. 3, if it is brought within twenty years from the date when the note became due. *Pierce v. Talbot*, 330.

Accommodation.

Where, at the solicitation of the cashier of a bank and for the purpose of making good an overdraft by a customer of the bank, a third person without receiving any consideration delivers to the cashier, who knows of such lack of consideration, his check drawn upon a second bank, payable to his own order and indorsed by him to be deposited to the credit of the overdrawn account, the first bank is not a party accommodated and can recover from the drawer of the check under R. L. c. 73, § 46. *Neal v. Wilson*, 336.

Indorsement.

Where the payee of a negotiable promissory note, given for a valuable consideration moving from a third person, indorses the note to the payee's wife and delivers it to the third person, the legal title to the note remains in the payee because the indorsement by the payee to his wife is void, but the third person becomes equitably entitled to the proceeds of the note and can enforce that right by an action in the name of the payee, even without his consent. *Nelson v. Piper*, 531.

Note of Partnership.

Liability of all partners upon a promissory note made in the partnership name by one of them acting within the scope of his implied authority. *Phipps v. Little*, 414.

Rights of Holder of Equitable Title.

Rights of one, to whom the payee of a negotiable promissory note, after indorsing it to the payee's wife, delivers it. *Nelson v. Piper*, 531.

Where, in an action for money had and received, the defendant, acknowledging that he owes the money in question to the person entitled to the proceeds of a certain note, and averring that a person other than the plaintiff claims it, pays the money into court and under R. L. c. 173, § 37, causes such claimant to be made a party, the plaintiff, although he has no legal title to the proceeds of the note, can prevail if he is equitably entitled to such proceeds. *Nelson v. Piper*, 531.

Waiver of Notice.

A waiver by the indorser of a promissory note of demand upon the maker is not a waiver of notice of the maker's default. *Hall v. Crane*, 326.

Defense of Fraud.

In an action on a promissory note, where the answer denies that the plaintiff is a holder in due course and alleges that the note was procured from the defendant by fraud of the payee and without consideration, the burden is on the defendant under R. L. c. 73, §§ 69, 72, 76, to prove the fraud on which he relies, and, if he does so, the burden is upon the plaintiff to prove that he acquired the note in due course, including proof not only that he took the note in good faith and for value but also that he had no notice of any defect in the title of the person negotiating it. *Lewiston Trust & Safe Deposit Co. v. Shackford*, 432.

In such a case the defendant may show the dealings between him and the agent of the payee, in which he contends that the fraud was committed, and for this purpose may introduce in evidence a letter received by him from such agent which constitutes a part of the transaction alleged to be fraudulent, without showing that the plaintiff when he took the note had any notice of the contents of such letter. *Ibid.*

BOND.

Evidence at the trial of an action against a married woman upon a bond to dissolve a mechanic's lien where it appeared that the original of the bond was lost and the defendant testified that she had no memory of signing it, was held to warrant submission to the jury of the question, whether the defendant executed the bond. *Rochford v. Atkins*, 463.

BOSTON.

The owner of a lot of land in Boston, who has built upon it a tenement house that extends over his whole lot without leaving an open yard behind it as required by St. 1907, c. 550, § 55, cannot maintain a petition for a writ of certiorari for the purpose of enforcing against the owner of the lot adjoining the rear of his lot the requirement of § 55 which he himself has violated. *Rudnick v. Murphy*, 470.

BOSTON ELEVATED RAILWAY COMPANY.

The elevators and their machinery reasonably necessary for transporting passengers between the surface of the ground and the station sixty feet underground in the East Boston tunnel beneath the corner of State Street and Atlantic Avenue are entrances to the tunnel to be furnished and paid for by the Boston Transit Commission and are not equipment of the railway required to be installed by the Boston Elevated Railway Company. *Boston v. Boston Elevated Railway*, 407.

Action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, in which it was held that there was no evidence that the defendant was responsible for the adoption or use of the escalator in question. *Theall v. Boston Elevated Railway*, 327.

BOSTON TRANSIT COMMISSION.

The elevators and their machinery reasonably necessary for transporting passengers between the surface of the ground and the station sixty feet underground in the East Boston tunnel beneath the corner of State Street and Atlantic Avenue are entrances to the tunnel to be furnished and paid for by the Boston Transit Commission and are not equipment of the railway required to be installed by the Boston Elevated Railway Company. *Boston v. Boston Elevated Railway*, 407.

BOUNDARY.

When on the face of a deed of land no uncertainty is disclosed as to the monuments or boundaries described, but the description is shown to be ambiguous when it is applied on the land to the monuments referred to, extrinsic evidence is admissible to show what boundaries the language of the deed was intended to describe. *Temple v. Benson*, 128.

BRIDGE.

Action for personal injuries due to the temporary opening of a trap door in the draw of a bridge by the draw tender. *Haves v. Milton*, 446.

BUILDING LAWS.

The owner of a lot of land in Boston who has built upon it a tenement house that extends over his whole lot without leaving an open yard behind it as required by St. 1907, c. 550, § 55, cannot maintain a petition for a writ of certiorari for the purpose of enforcing against the owner of the lot adjoining the rear of his lot the requirement of § 55 which he himself has violated. *Rudnick v. Murphy*, 470.

CARRIER.

Of Goods.

In an action against a railroad corporation by the indorsee of a bill of lading for the loss of a part of the goods in transit, for which the plaintiff sought

Carrier (*continued*).

to hold the defendant liable as the last carrier, it was held that there was evidence warranting a finding that the defendant was the last carrier and that another carrier in whose yard the rest of the goods were delivered to the plaintiff was the defendant's agent to haul the car to such yard, the use of which the defendant had hired for the delivery of the goods. *Shapiro v. Boston & Maine Railroad*, 70.

Of Passengers.

Actions by passengers against street railway and railroad corporations for personal injuries, see the appropriate subtitles under NEGLIGENCE.

CEMETERY.

The personal property of a private cemetery corporation is not exempted from taxation by St. 1909, c. 490, Part I, § 5, cl. 3, relating to the exemption from taxation of property of literary, benevolent, charitable and scientific institutions. *Milford v. County Commissioners*, 162

Whether a private cemetery corporation, none of whose officers receive compensation, which is not required by law to maintain a burial place for the public or for any general class other than those to whom it has sold lots but always has maintained a cemetery of great benefit to the public, which has unrestricted power to limit its membership but never has done so, and obtains funds for its maintenance and the maintenance of lots of its members from sales of lots and voluntary gifts, is a charitable corporation, was not decided. *Ibid.*

CERTIORARI.

The granting of a writ of certiorari is always a matter of judicial discretion and the writ never is granted when it would operate inequitably or unjustly. *Rudnick v. Murphy*, 470.

The owner of a lot of land in Boston, who has built upon it a tenement house that extends over his whole lot without leaving an open yard behind it as required by St. 1907, c. 550, § 55, cannot maintain a petition for a writ of certiorari for the purpose of enforcing against the owner of the lot adjoining the rear of his lot the requirement of § 55 which he himself has violated. *Ibid.*

The rule that a writ of certiorari lies only for the correction of errors of law apparent on the record is not changed by St. 1902, c. 544, § 27, which provides that the court may quash or affirm the proceedings in question, or may make such order, judgment or decree as law and justice may require. *Banaghan v. County Commissioners*, 17.

On a petition for a writ of certiorari to quash the proceedings of county commissioners under St. 1906, c. 463, Part II, § 78, prescribing the limits within which certain land of the petitioner might be taken by a railroad corporation, the answer of the respondents is conclusive as to their findings of fact stated therein, and only errors of law apparent on the record are open to correction. *Ibid.*

CHARITY.

A direction in a will that a trust fund should be paid "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go,

to provide free treatment for the insane in the Asylum of the Corporation," was held to create a trust for a charitable purpose. *Richards v. Church Home*, 502.

As to the same will it was held that the testatrix, by the words "Asylum of the Corporation," meant the McLean Asylum; that, since the trustee designated in the will could not act, it merely was necessary to appoint a new trustee; and that under the circumstances it was fitting that the Massachusetts General Hospital should act as such trustee. *Ibid*.

The personal property of a private cemetery corporation is not exempted from taxation by St. 1909, c. 490, Part I, § 5, cl. 3, relating to the exemption from taxation of property of literary, benevolent, charitable and scientific institutions. *Milford v. County Commissioners*, 162.

Whether a private cemetery corporation, none of whose officers receive compensation, which is not required by law to maintain a burial place for the public or for any general class other than those to whom it has sold lots but always has maintained a cemetery of great benefit to the public, which has unrestricted power to limit its membership but never has done so, and which obtains funds for its maintenance and the maintenance of lots of its members from sales of lots and voluntary gifts, is a charitable corporation, was not decided. *Ibid*.

CHELSEA.

Findings, in a suit in equity by a railroad corporation and its lessee to establish their rights in a certain location through certain streets of the city of Chelsea, that no abutter upon the railroad location had acquired or had any right or interest in any part of the location by reason of any adverse use or occupation thereof, that there had been no abandonment or modification of the location which reduced its width, and that the location was valid to that width, were warranted. *New York Central & Hudson River Railroad v. Chelsea*, 40.

CHILD.

Negligence of.

See NEGLIGENCE, *Of Child*.

Negligence of One in Charge of a Child.

See NEGLIGENCE, *Of Person in Charge of Child*.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

Constitutionality of Civil Service Statutes.

St. 1911, c. 468, which extends the provisions of the civil service law to chiefs of police and city marshals of certain cities and towns, is constitutional. *Barnes v. Mayor of Chicopee*, 1.

Civil Service (continued).

The principal provisions of R. L. c. 19, known as the civil service act, are constitutional, without regard to the validity of the provisions relating to veterans' preference, which are distinct and severable from the rest of the statute. *Barnes v. Mayor of Chicopee*, 1.

Constitutionality of St. 1911, c. 624, relating to petitions in police, district and municipal courts for reviewing the removal from office, lowering in rank or compensation, suspension or transfer of one holding office under the civil service. *Driscoll v. Mayor of Somerville*, 493.

Effect and Application of Civil Service Statutes.

Effect and application of St. 1911, c. 468, extending the civil service to the chief of police and city marshals in certain cities and towns. *Driscoll v. Mayor of Somerville*, 493.

Construction and application of the provision of St. 1906, c. 210, St. 1907, c. 272, that "Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior." *Ibid.*

The decision of a police, district or municipal court on a petition under St. 1911, c. 624, to review an order of a mayor removing the petitioner from office is final, and is not open to review on a petition for a writ of mandamus ordering the reinstatement of the petitioner. *Barnes v. Mayor of Chicopee*, 1.

CONSTITUTIONAL LAW.

Separation of Powers.

Constitutionality of St. 1911, c. 624, relating to petitions in police, district and municipal courts for reviewing the removal from office, lowering in rank or compensation, suspension or transfer of one holding office under the civil service. *Driscoll v. Mayor of Somerville*, 493.

Police Power.

St. 1911, c. 468, which extends the provisions of the civil service law to chiefs of police and city marshals of certain cities and towns, is constitutional. *Barnes v. Mayor of Chicopee*, 1.

The principal provisions of R. L. c. 19, known as the civil service act, are constitutional, without regard to the validity of the provisions relating to veterans' preference, which are distinct and separable from the rest of the statute. *Ibid.*

R. L. c. 102, § 172, providing, as amended by St. 1905, c. 341, that the mayor of a city or the selectmen of a town may grant a license for theatrical exhibitions and "may revoke or suspend such license at their pleasure," is constitutional as a proper exercise of the police power. *Commonwealth v. McGann*, 213.

The sixteenth article of the Declaration of Rights in the Constitution of this Commonwealth, which declares that "the liberty of the press" ought not

to be restrained, has no application to the restraint of the oral publication of the text of a play in a theatrical performance. *Commonwealth v. McGann*, 213.

St. 1909, c. 536, relating to the supervision of plumbing and providing among other things for the examination and licensing of master and journeyman plumbers and for the punishment of persons who, without being licensed according to the provisions of the statute, perform any work in plumbing which is subject to inspection, is a reasonable exercise of the police power and is constitutional. *Commonwealth v. Beaulieu*, 138.

Liberty of the Press.

The sixteenth article of the Declaration of Rights in the Constitution of this Commonwealth, which declares that "the liberty of the press" ought not to be restrained, has no application to the restraint of the oral publication of the text of a play in a theatrical performance. *Commonwealth v. McGann*, 213.

Disbarment of Attorney.

R. L. c. 165, § 44, authorizing the removal of an attorney at law for deceit, malpractice or other gross misconduct, is constitutional. *Boston Bar Association v. Casey*, 549.

Referendum.

In St. 1911, c. 468, which provides for the extension of the civil service law to chiefs of police and city marshals in certain cities and towns, the provision of § 3, that the act shall be submitted to the voters of the cities or towns to which it is applicable and shall take effect in any such city or town only upon its acceptance by a majority of the voters voting thereon, is constitutional. *Barnes v. Mayor of Chicopee*, 1.

CONTRACT.

What constitutes.

Where a building contractor, in consideration of the signing and delivering by a laborer to him of a release discharging him from all demands arising from certain personal injuries which the laborer had sustained because of negligence of such contractor, agrees to pay to the laborer \$300 and, if the laborer is not able to resume work at the end of six weeks, to "make it right with" him, and the laborer signs and delivers the release and receives the \$300, a contract is made which is not void for indefiniteness. *Brennan v. Employers Liability Assurance Corp.* 365.

Determination, upon the evidence in an action against a manufacturer by a purchaser of cotton yarns, as to whether a contract for the manufacture and sale of cotton yarns was made between the manufacturer and the purchaser by correspondence of a broker with both parties. *Stroock Plush Co. v. New England Cotton Yarn Co.* 354.

Action against a milling company by one of its customers upon a contract in writing to sell certain meal to the plaintiff, in which it appeared that

Contract (*continued*).

before all of the meal had been called for by the customer, the company's mills were destroyed by fire and the company refused to complete the delivery of the meal, and it was held that no title to the meal had passed to the customer before the fire, so that it was not the customer's meal that was destroyed and the company might be found liable for refusing to complete delivery. *Chandler Grain & Milling Co. v. Shea*, 398.

Validity.

Where a building contractor, in consideration of the signing and delivering by a laborer to him of a release discharging him from all demands arising from certain personal injuries which the laborer had sustained because of negligence of such contractor, agrees to pay to the laborer \$300, and, if the laborer is not able to resume work at the end of six weeks, to "make it right with" him, and the laborer signs and delivers the release and receives the \$300, a contract is made which is not void for indefiniteness. *Brennan v. Employers Liability Assurance Corp.* 365.

Construction.

Construction, in an action against a manufacturer by a purchaser of cotton yarns, of a contract for the manufacture and sale of cotton yarns made between the manufacturer and the purchaser by correspondence of a broker with both parties. *Stroock Plush Co. v. New England Cotton Yarn Co.* 354.

Action against a milling company by one of its customers upon a contract in writing to sell certain meal to the plaintiff, in which it appeared that before all of the meal had been called for by the customer, the company's mills were destroyed by fire and the company refused to complete the delivery of the meal, and it was held that no title to the meal had passed to the customer before the fire, so that it was not the customer's meal that was destroyed and the company might be found liable for refusing to complete delivery. *Chandler Grain & Milling Co. v. Shea*, 398.

Where a building contractor, in consideration of the signing and delivering by a laborer to him of a release discharging him from all demands arising from certain personal injuries which the laborer had sustained because of negligence of such contractor, agrees to pay to the laborer \$300 and, if the laborer is not able to resume work at the end of six weeks, to "make it right with" him, the words "make it right" may be found to mean that in the contingency named the laborer shall have fair compensation for his injuries paid to him in money exceeding the \$300 already paid to him. *Brennan v. Employers Liability Assurance Corp.* 365.

In the construction of a contract in writing between an inventor and another person, which provided for the assignment of a one half interest in an invention, for a division of profits, for a salary to be paid by the other person to the inventor, and that payments of expenses in procuring patents should be "charged up against the profits of the concern before said profits are divided," it was held that it could not be ruled that the salary was to be paid to the plaintiff only for a reasonable time, because it was the manifest intention of the parties that the agreement should remain in force until the expenses of procuring the patents were paid by the defendant. *Williams v. Knibbs*, 534.

It also was held that under the contract the parties did not become partners, and that, irrespective of whether there were profits or not, the defendant was bound to pay the salary to the plaintiff so long as the contract was in force. *Williams v. Knibbs*, 534.

A contract under seal for the sale to a testator of certain securities, which provided for payment within ninety days from the date of the contract in part in cash and in part by the testator's interest bearing promissory notes, and for the deposit as escrows within the ninety days of all the documents to be paid or delivered by either party to the other, and which closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties, "as to each and all of its provisions, whether so expressed in appropriate words or not," was held, upon the death of the testator forty-two days after the date of the contract without having made any of the deliveries called for by the contract, not to be enforceable against the executor of his will. *Browne v. Fairhall*, 290.

And it also was held that the express stipulation that the contract should bind the heirs, executors and administrators of the parties referred only to the performance of the obligations growing out of the contract after all the papers and instruments required by it had been delivered as escrows to the trust company. *Ibid.*

Implied.

In fact.

Action for use and occupation of land of the plaintiff upon which a part of an ell of a building of the defendant stood, in which it was held that a finding for the plaintiff was warranted, as it might have been inferred from the defendant's conduct that he agreed to become a tenant at the rent of \$1 a day, but that he did not acquiesce in an attempt of the plaintiff to increase the rent during the tenancy. *Sellers v. Frank*, 298.

In law.

One, who was appointed and has served and been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he has received. *Riopel v. Worcester*, 15.

Upon breach, by the owner of an automobile insured against loss or damage by fire, of a certain warranty in the policy, the policy was held to have become void, and it also was held that the owner was not entitled to a return of any premium which he had paid thereon. *Elder v. Federal Ins. Co.* 389.

Where the payee of a promissory note delivers it to a third person for a valuable consideration but, by agreement with such third person, indorses it to the payee's wife, and thereafter the payee has no further interest in it and the third person holds it in good faith, such third person can maintain an action for money had and received against one to whom the maker of the note made a common law assignment for the benefit of his creditors and who admits that there is a dividend due to the person entitled to the proceeds of the note. *Nelson v. Piper*, 531.

Because acts of the selectmen of a town, in granting licenses to sell intoxicating liquors, and of the treasurer of the town in receiving the license fee and

Contract (continued).

in paying a portion thereof into the town treasury, are acts of public officers and not of officers of the town, such a licensee cannot recover from the town the amount of a license fee paid under a mistake of fact. *Brown v. Nahant*, 271.

In assuming for the purposes of decision, that money paid for a license to sell intoxicating liquors can be recovered in an action of contract upon proof that the license for which the money was paid was void *ab initio*, it was said by the court that this point never has been decided in this Commonwealth. *Ibid.*

If a tenant of the United States occupying a building on land of the United States, which has been acquired by purchase and by condemnation proceedings for the purposes of national defense but has not yet been used for such purposes, chooses to apply to the selectmen of the town in which the property is situated for a license to sell intoxicating liquors and is granted such a license, he cannot afterwards recover the money that he voluntarily paid for such license, whether or not he lawfully could have carried on his business without the license. *Ibid.*

Modification.

Evidence from which it was held that a contract, made by correspondence, for the sale of certain cotton cloth was afterward modified in the same way. *Bristol Manuf. Corp. v. Arkwright Mills*, 172.

Revocation.

An attempted revocation of a contract, which attempt afterwards is abandoned when the other party insists upon performance, cannot be treated as a refusal of performance that relieves the other party from his obligation to perform his part of the contract. *Smith & Rice Co. v. Canady*, 122.

Performance and Breach.

A series of omissions in performance of a contract to use one's "best efforts to further the interests" of another, no one of which alone would constitute a substantial breach of the contract, may constitute a failure to perform the contract substantially. *Casavant v. Sherman*, 23.

It seems, that one who, having previously been engaged in taking contracts for lathing houses, enters the employ of a lathing contractor under a contract by which he is to receive \$4 a day and agrees "to use his best efforts to further the interests of" his employer, is not excused by an inability to read and write from an obligation to keep account of the times and amount of the work done by the men placed under him. *Ibid.*

An attempted revocation of a contract, which attempt afterwards is abandoned when the other party insists upon performance, cannot be treated as a refusal of performance that relieves the other party from his obligation to perform his part of the contract. *Smith & Rice Co. v. Canady*, 122.

In an action for the alleged breach of a contract to employ the plaintiff as the general manager of a paper mill for a period of five years, where the contract provided that, in case the plaintiff's work as general manager should not be satisfactory, the defendant might give him other work instead, and where it appears that the defendant gave notice to the plaintiff of such a change

of work and that the plaintiff declined to accept such change, the defendant under an answer alleging a general denial may introduce evidence of damages suffered by the defendant through mismanagement by the plaintiff as tending to show that the plaintiff was deposed justifiably. *Bennett v. Kupfer Brothers Co.* 218.

One, who has agreed to purchase certain real estate if the title is good, is not bound to take a doubtful title merely because from a commercial point of view it might be thought that his title would not be likely to be disturbed. *Foster, Hall & Adams Co. v. Sayles*, 319.

In an action to recover an amount deposited at an auction sale of certain real estate under an agreement that if the title was not good the money would be refunded, in accordance with the established law of this Commonwealth as to what constitutes a good title the plaintiff must prove that the title offered by the defendant was not good beyond such a reasonable doubt as would cause a prudent man to pause and hesitate before investing his money. *Ibid.*

Where, in such an action it appears that the title offered by the defendant was derived from a foreclosure sale under a mortgage and the plaintiff contends that such title was not good, either because of doubt as to whether the foreclosure sale was in accordance with the terms of the power of sale in the mortgage, or as to whether the mortgage foreclosed had not been discharged before the foreclosure sale, the question whether either of these doubts was well founded cannot be determined finally in the absence of the parties interested, and the question to be passed upon is whether the title offered by the defendant was so doubtful that no one should be compelled to take it or be held to have been wrong in refusing to take it. *Ibid.*

In the same action it was held, on the evidence, that, in the absence of the persons who were the owners of the equity of redemption, it could not be adjudged that it was free from doubt that a certain deed purporting to discharge the mortgage did not discharge it as to the defendant. *Ibid.*

At the trial of an action of contract against a milling company for failure to perform a contract for the sale by the defendant to the plaintiff of a certain quantity of meal, the plaintiff "to have free storage for any portion of" the meal for a specified time at his own risk as far as fire was concerned, where it appeared that a fire destroyed the defendant's mill before the plaintiff had called for the quantity of meal designated in the contract and that no meal or corn had been set apart for the plaintiff at any time, evidence of a trade custom to the effect that corn was spoken of as meal, and that when meal was sold it was sold in the grain with the understanding that it should be ground into meal shortly before delivery, was held rightly to have been excluded. *Chandler Grain & Milling Co. v. Shea*, 398.

In the same action it was held that no title to the meal had passed to the customer before the fire, so that it was not the plaintiff's meal that was destroyed and the defendant might be found liable for refusing to complete delivery. *Ibid.*

And in the same action it was held to have been proper for the judge to refuse to rule that in no event could the plaintiff recover more than the contract price. *Ibid.*

Determination, upon the evidence in an action against a manufacturer by a purchaser of cotton yarns, as to whether a contract for the manufacture and

Contract (*continued*).

sale of cotton yarns was broken by the manufacturer and as to the extent of liability if there was a breach. *Stroock Plush Co. v. New England Cotton Yarn Co.* 354.

A contract under seal for the sale to a testator of certain securities, which provided for payment within ninety days from the date of the contract in part in cash and in part by the testator's interest bearing promissory notes, and for the deposit as escrows with a trust company within the ninety days of all the documents to be paid or delivered by either party to the other, and which closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties, "as to each and all of its provisions, whether so expressed in appropriate words or not," was held, upon the death of the testator forty-two days after the date of the contract without having made any of the deliveries called for by the contract, not to be enforceable against the executor of his will. *Browne v. Fairhall*, 290.

And it also was held that the express stipulation that the contract should bind the heirs, executors and administrators of the parties referred only to the performance of the obligations growing out of the contract after all the papers and instruments required by it had been delivered as escrows to the trust company. *Ibid.*

Damages.

Damages for breaches of contract, see DAMAGES, *In Contract*.

CONVERSION.

Explanation by LORING, J., of the use of the term "conversion" in actions of tort in the nature of trover. *Varney v. Curtis*, 309.

If one to whom bonds have been entrusted by their owner for safe keeping wrongfully pledges them as security for his own debt to a pledgee who has had notice of the rights of the owner, the taking of the bonds as such pledgee after such notice is an exercise of dominion over them which constitutes a conversion of the bonds as against their owner. *Ibid.*

Where one to whom bonds have been entrusted by their owner for safe keeping wrongfully pledges them to a pledgee who has had no notice of the rights of the owner, if the pledgee on payment of his claim in good faith returns the bonds to the wrongful pledgor, he has committed no conversion. *Ibid.*

But if such pledgee by direction of the wrongful pledgor in good faith delivers the bonds to a third person as a new pledgee and takes from the new pledgee the amount of his claim which the bonds were pledged to him to secure, he has taken part in an act of dominion over the bonds for his own benefit, and the exercise of such dominion is a conversion for which he is liable to the owner of the bonds. *Ibid.*

Where a woman entrusted to her son-in-law for safe keeping certain non-negotiable registered bonds and certain negotiable bonds, and the son-in-law, after forging indorsements upon the registered bonds, wrongfully pledged them and the negotiable bonds to secure his own debt, in an action against the pledgee by such owner of the bonds for their alleged conversion, it was held, that, even if the plaintiff had been careless in entrusting her

bonds to the pledgor for safe keeping, which it did not appear that she was, this would not have helped the defendant, as the plaintiff owed him no duty to keep her securities carefully. *Varney v. Curtis*, 309.

CORPORATION.

In a certain action under the employers' liability act against a corporation for causing the death of one of its workmen, it was held to be no defense that, after the employment of such workman and before the accident which caused his death, the defendant had transferred to another corporation the business in which such workman was employed, if the deceased workman had no knowledge of a change in his employer and was not put upon inquiry in regard to such a change. *Beauregard v. Benjamin F. Smith Co.* 259.

COUNTY COMMISSIONERS.

A railroad corporation, which has leased its property to another railroad corporation but retains its corporate existence, can maintain a petition to the county commissioners under St. 1906, c. 463, Part II, § 78, for an order prescribing the limits within which the petitioner may take land which is necessary for additional tracks and which cannot be obtained by agreement with the owner, and upon such petition it is immaterial whether the lease made by the petitioner is valid or invalid. *Banaghan v. County Commissioners*, 17.

COVENANT.

See that subtitle under LANDLORD AND TENANT.

CUSTOM.

At the trial of an action of contract against a milling company for failure to perform a contract for the sale by the defendant to the plaintiff of a certain quantity of meal, the plaintiff "to have free storage for any portion of" the meal for a specified time at his own risk as far as a fire was concerned, where it appeared that a fire destroyed the defendant's mill before the plaintiff had called for the quantity of meal designated in the contract and that no meal or corn had been marked or set apart for the plaintiff at any time, evidence of a trade custom to the effect that corn was spoken of as meal, and that when meal was sold it was sold in the grain with the understanding that it should be ground into meal shortly before delivery, was held rightly to have been excluded. *Chandler Grain & Milling Co. v. Shea*, 398.

DAMAGES.

For Land taken or injured under Statutory Authority.

Where land is taken by a city under statutory authority for the widening of a highway, and the owner of such land has filed and prosecuted a petition for damages for the taking, such owner by the prosecution of his petition ad-

Damages (continued).

mits that the proceedings for the taking of his land were legal and regular, and the remedy provided by the statute for compensation is exclusive. *Preston v. Newton*, 483.

A city taking land for the widening of a highway under statutory authority is not obliged to grade the way to the level of adjacent land or to construct approaches from such land. If the owner of such adjacent land is compelled to incur expense in order to provide access to the way from his land, such expense will be taken into account in assessing his damages for the taking. *Ibid.*

In Contract.

In an action against a milling company for damages due to its failure to perform a contract providing for the sale to the plaintiff of a certain quantity of meal at a certain price, it is proper for the judge to refuse to rule that in no event could the plaintiff recover more than the contract price. *Chandler Grain & Milling Co. v. Shea*, 398.

In an action of contract to recover damages for the failure of the defendant to receive and accept certain goods which he had ordered in writing and agreed to buy from the plaintiff, where no special damages are alleged, the measure of damages is the difference between the contract price of the goods and their market value at the time and place where they were to have been delivered. *F. W. Stock & Sons v. Snell*, 449.

In an action of contract for the alleged wrongful termination by the defendant of a contract to employ the plaintiff for one year, the presiding judge properly may refuse to rule, that, admitting that the plaintiff had been dismissed wrongfully from his employment, a verdict must be ordered for the defendant unless the plaintiff proves his actual loss by showing what he has done with his unemployed time and how much he has earned elsewhere; because, even if such a rule of damages should be applied, the plaintiff still would be entitled to nominal damages. *Dixon v. Volunteer Co-operative Bank*, 345.

An attorney at law, who is employed by a co-operative bank as its attorney for a year to perform the duty of examining the titles to land offered to the bank as security for loans to be made to applicants, by whom the attorney is to be paid for his services, such earnings amounting to about \$1,000 a year, is not bound to account to the bank for his time, and, if he is discharged wrongfully by the bank shortly after the beginning of the year for which he was employed, the damages to which he is entitled in an action by him against the bank for its breach of contract are not to be diminished by reason of his earnings from additional work undertaken by him after his wrongful discharge by the defendant. *Ibid.*

Where, at the trial of an issue, submitted to a jury in a petition for the establishment of a mechanic's lien for work done and materials furnished in the construction of a building under a contract in writing, as to what sums were due to the petitioner after the giving to the respondent of such credits as he was entitled to, the respondent introduces evidence tending to show that there were omissions and defects in the performance of the contract of such a nature that they could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, the petitioner is entitled to have the jury instructed that there should be deducted from the contract price the amount by which the value of the building as left by him fell short

of what that value would have been if the contract had been exactly performed. *Pelatonski v. Black*, 428.

In Tort.

In an action against a corporation operating a street railway for causing the death of the plaintiff's intestate, it is proper to exclude upon the issue of damages a question, "What have you noticed as to cars going along that particular stretch?" *Mahoney v. Boston Elevated Railway*, 196.

Although the plaintiff in an action for damages resulting from a nuisance cannot recover for damages which he could have avoided by the exercise of reasonable precautions, he is not required to take unreasonable steps or to commit a wrongful act or trespass upon the property of another in order to avoid damage. *Fairfield v. Salem*, 296.

Application of the foregoing principle in an action by the owner of a wharf against a city for damages resulting from a discharge of sewage by the defendant into the dock adjoining the wharf, where there was evidence tending to show that the plaintiff had attempted to get permission from the harbor and land commissioners to dredge the dock and that the permission for some time had been refused; that when he did get permission, the owner of a neighboring dock, which also would have had to be dredged in order for the plaintiff's dock to be dredged, refused his permission; and that the plaintiff had been given some assurance by the public officials that the defendant would attend to the dredging. *Ibid*.

In Recoupment.

It is a general rule that a defendant cannot set up a claim in recoupment in reduction of damages unless he could have enforced such claim in an action against the plaintiff. *Graham v. Middleby*, 437.

Accordingly, at a trial for the assessment of damages for the breach of a bond to secure the performance by a corporation of a contract, under which the plaintiff paid to the corporation \$6,000 for a storage battery and the corporation agreed that, if an injunction should issue restraining the plaintiff from using the battery, the plaintiff should have the right upon notice in writing to the corporation to withdraw from the contract and that the corporation thereupon would repay him the purchase money, where the corporation was not a party to the bond nor to the action, the defendant was not allowed to recoup for damages sustained by the corporation by reason of the plaintiff's failure to use reasonable care to keep the battery in good condition. *Ibid*.

DEATH.

Actions for death caused by negligence, see NEGLIGENCE, *Causing Death*.

DECEIT.

It is not the tendency of the law to-day to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk. By RUGG, C. J. *Noyes v. Meharry*, 598.

Deceit (*continued*).

Action, for deceit by means of alleged false and fraudulent representations in regard to the net profits from the business of a moving picture theatre whereby the plaintiff was induced to purchase the business, in which it was held that there was evidence warranting the submission to a jury of the questions, whether the representations made by the defendant were false and fraudulent and whether the plaintiff relied upon them. *Noyes v. Meharry*, 598.

In such an action it cannot be said, as a matter of law, that the fullest opportunity to examine a moving picture theatre would demonstrate the truth or falsity of statements as to the net profits derived from it. *Ibid*.

DEED.

Validity.

Deed of an aged man conveying real estate through a third person to his wife, who conveyed it to her nephew, which was set aside because it was procured by undue influence of the wife and nephew. *Smith v. Kenney*, 6.

In a deed conveying an acre of land and providing that the grantee "is to have with said acre a spring of water northeast of said land near an apple tree," the description of the spring is not void for uncertainty if when its language is applied to the surface of the earth it identifies a particular spring. *Tinker v. Bessel*, 74.

Construction.

When on the face of a deed of land no uncertainty is disclosed as to the monuments or boundaries described, but the description is shown to be ambiguous when it is applied on the land to the monuments referred to, extrinsic evidence is admissible to show what boundaries the language of the deed was intended to describe. *Temple v. Benson*, 128.

Under a deed of real estate to a husband and wife, described as such, made after St. 1885, c. 237, by the habendum clause of which the grantees are to hold "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own use and behoof forever," the grantees take not as simple joint tenants but as tenants by entirety. *Hoag v. Hoag*, 50.

A deed, after describing an acre of land conveyed in fee, continued as follows: "The said [grantee] is to have with said acre a spring of water northeast of said land near an apple tree, with the right to bring it on to said premises." The spring was identified by the description. Held, that the deed conveyed in fee so much of the land out of which the spring issued as was necessary for the reasonable use of the spring as well as a right to the water. *Tinker v. Bessel*, 74.

In a deed conveying to the plaintiff certain land with "the necessary use of a private right of way from" a certain public way "as now used, across our premises on the east and south sides of said house to the within granted premises," the words "necessary use" were held to mean such use as was reasonably necessary to the full enjoyment of the plaintiff's land, and the words "as now used" were held to be descriptive of the location of the way and not of the nature or manner of its use. *Crosier v. Shack*, 253.

In the same case it further was held that the use reasonably necessary to the plaintiff's full enjoyment of the premises might vary from time to time with what constituted such full enjoyment, so that the plaintiff was entitled to a decree protecting him in his right to use the way for driving an automobile as well as for driving a paint cart. *Crosier v. Shack*, 253.

In an action of tort by the owner of a farm against a railroad corporation for the obstruction of a private way, it appeared that the way was constructed across the railroad location by the defendant in accordance with an agreement with a predecessor in title of the plaintiff, contained in a clause of a deed to a predecessor of the defendant of a part of its location, and it was held that the clause could not operate as an exception, because it created a new right of way, nor as a reservation of an easement in fee because the word "heirs" was not used, so that the action at law could not be maintained. *Childs v. Boston & Maine Railroad*, 91.

In the same case, it was said, that the clause created an equitable easement founded on contract which could be enforced in equity. *Ibid*.

DESCENT AND DISTRIBUTION.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, the widow of a man who died intestate without issue takes a one half interest in real estate in which her husband at the time of his death had a vested remainder, subject to a life estate that terminated after his death. *Walden v. Walden*, 418.

DEVISE AND LEGACY.

General Rule of Construction.

Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended. *Russell v. Lilly*, 529.

Identification by Extrinsic Evidence.

Where a certain will provided that certain legacies should be paid from the money of the testatrix deposited in the Worcester Five Cents Savings Bank, it was held that under the circumstances facts could be shown by extrinsic evidence from which it could be found that the testatrix intended to designate the Worcester County Institution for Savings. *Bullard v. Leach*, 117.

What Interest.

Where a testator named his wife as the sole executrix of his will and devised and bequeathed to her the whole of his estate "to be used and enjoyed by her for her comfort and support during her natural life" with a provision that any part of his estate "not used by her for her comfort and support during her natural life," after the payment of two small legacies, should go in equal shares to certain nephews and a niece, it was held, that the testator's widow took only a beneficial interest for life with a limited power of disposal, and that therefore the bequest over was valid. *Allen v. Hunt*, 276.

Construction of a clause of a will reading as follows: "I give and bequeath to my daughters . . . the home place which was deeded to me by my

Devise and Legacy (continued).

husband . . . as long as they remain single. The one marrying first, then giving up all her right and title in the place to the unmarried sister," followed by a residuary clause dividing equally between the same two daughters the residue of the estate of the testatrix, specifically including her share in the estate of her deceased husband. *Ruggles v. Jewett*, 167.

Specific Legacy.

A will made ten pecuniary legacies and then provided as follows: "The last ten legacies aforesaid are to be paid only out of the monies now deposited in" three savings banks designated. At the time of making the will and at the time of her death the testatrix had deposits in the three savings banks designated, amounting in all to a little more than the amount of the ten legacies, and it was held that the ten legacies were specific and not general legacies. *Bullard v. Leach*, 117.

For Charitable Purposes.

See CHARITY.

Trust.

As to trusts created by wills, see TRUST.

To "Unmarried" Daughter.

Where a will provided that the income of the estate "remaining," after certain payments to the testator's widow and to such of his daughters as then should have become married or thereafter should marry, should be paid to such of the daughters "as shall be unmarried so long as they or she shall remain unmarried," it was held that no income was intended to be paid to a daughter after she became married, although she should become a widow. *Russell v. Lilly*, 529.

Restraint of Marriage.

A provision in the will of a testatrix giving to two daughters named life estates in "the home place . . . , as long as they remain single," with a provision that on the marriage of either of them her life estate shall pass to her sister, followed by a clause making the same two daughters residuary devisees to whom "the home place" is devised subject to the life estates, is not against public policy as being in restraint of marriage. *Ruggles v. Jewett*, 167.

DISBARMENT PROCEEDINGS.

The decision of this court in *Boston Bar Association v. Casey*, 211 Mass. 187, in regard to the nature of a proceeding for disbarment, the relation to such a petition of an incorporated bar association as the petitioner, and the qualification of the judges of the Superior Court to sit in the case as affected by their membership in such association, here was affirmed. *Boston Bar Association v. Casey*, 549.

In overruling further exceptions of a respondent in that case, it was said that the court were forced to the conclusion that the motions of the respondent then before them were made for the purpose of delay in a proceeding of a kind in which it was especially important that the truth should be ascertained and declared speedily. *Boston Bar Association v. Casey*, 549.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOG.

The owner of an automobile may maintain an action under R. L. c. 102, § 146, against the owner of a dog which caused the automobile to skid from the right hand side of a public way and to come directly in front of a horse, whereupon the horse reared and descended on the top of the automobile, injuring it. *Williams v. Brennan*, 28.

DOG OFFICER.

The provisions of St. 1910, c. 629, which went into effect on July 15, 1910, for reimbursement of the amount of a bill for the services of a dog officer, were held to apply to payments made to dog officers who were appointed in the year 1910 after it went into effect, and therefor to apply to payments made to an officer appointed on July 26 of that year although R. L. c. 102, § 143, provides that the dog officer should be appointed "annually, within ten days after the first day of July." *Taunton v. County of Bristol*, 222.

Application of the provision of the statute that in cities of twenty-five thousand inhabitants, or more, dog officers "shall be paid the same wages per diem during the term of their employment which the regular police officers of such cities receive." *Ibid*.

DONATIO CAUSA MORTIS.

Facts which were held not to show a *donatio causa mortis*. *Stratton v. Athol Savings Bank*, 46.

DRAW TENDER.

A competent draw tender employed to operate a draw by a town, upon which the duty is imposed by statute to maintain the draw and employ such a draw tender, acts in the performance of his duties as a public officer and is not an agent of the town, and, if a traveller is injured by the negligence of such draw tender in operating the draw, his only remedy is against the draw tender personally. *Howes v. Milton*, 446.

EASEMENT.

By Prescription.

In a suit in equity to restrain the defendant from interfering with the plaintiff's use of a certain spring surrounded by land of the defendant and con-

Easement (continued).

vayed in fee by the defendant's predecessor in title to the plaintiff's predecessor in title, it appeared that the defendant and his predecessors in title had used the spring continuously for more than thirty years, but that the quantity of water thus used was much less than the capacity or normal flow of the spring, and it was held that the prescriptive right to withdraw water from the spring acquired by the defendant was measured by the amount of water actually withdrawn, and that no title to the entire spring was acquired. *Tinker v. Bessel*, 74.

In an action for the obstruction of a right of way alleged to have been acquired by prescription, certain evidence was held rightly to have been admitted of a conversation between the deceased predecessor in title of the defendant and the husband of the plaintiff's predecessor in title, tending to show that the use of the way by the plaintiff's predecessor in title was permissive and not adverse. *Daw v. Lally*, 578.

Equitable.

A private right of way across a railroad location, constructed and used in accordance with a personal agreement in a deed of a part of the location by the owner of a farm which the location divided, was said to be enforceable in equity by a successor of the owner of the farm against a successor of the railroad corporation. *Childs v. Boston & Maine Railroad*, 91.

Abandonment.

In a suit in equity to restrain the defendant from interfering with the plaintiff's right, created by deed, to a certain spring surrounded by land of the defendant, it was held, that, even if a title in fee such as the plaintiff acquired under the deed could be lost by non-user and abandonment, the question, whether the plaintiff had abandoned his right, was one of fact to be determined on all the evidence. *Tinker v. Bessel*, 74.

EAST BOSTON TUNNEL.

The elevators and their machinery reasonably necessary for transporting passengers between the surface of the ground and the station sixty feet underground in the East Boston tunnel beneath the corner of State Street and Atlantic Avenue are entrances to the tunnel to be furnished and paid for by the Boston Transit Commission and are not equipment of the railway required to be installed by the Boston Elevated Railway Company. *Boston v. Boston Elevated Railway*, 407.

ELECTION.

Election of remedy, see *Preston v. Newton*, 483.

Election between counts, see *Mistretta v. Cutulle*, 250.

ELECTIONS.

In the construction of St. 1912, Part III, § 1, with regard to the vote at an election in Salem as to whether the city's charter should be repealed, it was held

that the words of the statute, the "majority of the ballots cast at said election," meant a majority of the votes cast upon that question, and not the majority of all the votes cast at the election, and that the charter was repealed. *Cashman v. City Clerk of Salem*, 153.

ELEVATED RAILWAY.

Actions against elevated railway corporations for personal injuries, see NEGLIGENCE, *Elevated Railway*.

ELEVATOR.

One who is in control of an elevator is not liable to a person who, while not in the exercise of due care, is injured by a fall from the elevator caused by a failure to equip it with the safety guards required by R. L. c. 104, § 43. *Amiot v. Foster*, 573.

Evidence which was held as matter of law to show such lack of due care. *Ibid*. Elevators in East Boston Tunnel were held to be "entrances" and not "equipment." *Boston v. Boston Elevated Railway*, 407.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

ENTIRETY, TENANTS BY.

See TENANTS BY ENTIRETY.

EQUITABLE EASEMENT.

See EASEMENT, *Equitable*.

EQUITABLE LIEN.

An agreement made by the plaintiff in an action of tort for conversion, who has obtained a verdict on which no judgment has been entered, with the attorney at law who conducted the case, that the proceeds of the judgment should be taken by the attorney on account of such plaintiff's indebtedness to him for services and disbursements in that and other litigation, was held to create as between the parties a right in the nature of a lien enforceable in equity, so that the claim upon the verdict could not be reached and applied, by a suit under R. L. c. 159, § 3, cl. 7, to the payment of a debt due to another creditor of such plaintiff. *Delval v. Gagnon*, 203.

EQUITABLE RESTRICTIONS.

If, at the time that a restriction was placed upon a lot of land providing that no building should be constructed or maintained thereon "other than for a single family or as a double, otherwise called a semi-detached house," a

Equitable Restrictions (continued).

two-family house stood thereon, a suit in equity may be maintained to prevent the alteration of the two-family into a three-story tenement house, regardless of the extent to which the old building entered into its construction. *Allen v. Barrett*, 36.

Facts which were held to warrant a finding that the plaintiff in such a suit was not guilty of laches. *Ibid.*

Who may be parties plaintiff in a suit in equity to enjoin the infringement of equitable restrictions, imposed on lots in a tract of land in furtherance of and as a part of a general scheme for the development of the tract as a residential district. *Ibid.*

A mandatory injunction may be issued compelling the removal of structures erected upon land in violation of building restrictions to which the land was subject, although the defendant had received the land by descent and at the time that he erected the structures in question he was not aware of the restrictions, which were in the deed to his ancestor. *Ibid.*

EQUITY JURISDICTION.

Laches.

Facts which were held to warrant a finding that a plaintiff in a suit to enjoin the infringement of an equitable restriction was not guilty of laches. *Allen v. Barrett*, 36.

In a suit in equity by a woman against an attorney at law for an accounting as to certain real estate, which the defendant wrongfully had bought for his own benefit at a foreclosure sale when he had been employed by the plaintiff to buy it for her, it was said that, under the circumstances, a delay of a year and nine months after the defendant's purchase of the real estate would not have been a bar to the bill, even if the defense of laches had been pleaded. *Rolikatis v. Lovett*, 545.

Remedy at Law.

The owner of a strip of land, of which a city unlawfully has taken possession under an attempted taking for an unauthorized purpose, cannot maintain a suit in equity against the city to remove a cloud upon his title, because he is not in possession of the land and also because he has adequate remedies at law. *Preston v. Newton*, 483.

In this Commonwealth a court of equity will not take jurisdiction of a suit against an executor or administrator, who has not fully administered the estate of his testator or intestate, for an accounting, where the objection is seasonably taken and afterwards insisted on that there is a plain, adequate and complete remedy in the Probate Court. *Allen v. Hunt*, 276.

Suit in equity, in which it was held that, for any failure on the part of one sister properly to distribute the income of certain trust property left to her and her sister in trust under a will, there was ample remedy in the Probate Court, so that such failure furnished no defense to a suit in equity to compel the children of the second sister to make formal a certain conveyance of some of the trust property which she ineffectually had attempted to convey to the first sister. *Coates v. Lunt*, 401.

Negligence barring Suit.

Reliance, by one purchasing an overdue mortgage from a savings bank, upon representations of the bank's president as to what property was covered by the mortgage, was held under the circumstances not to have been negligence which would bar a suit in equity for rescission of the sale by reason of a mutual mistake of the parties as to what was included in the mortgage. *Shapira v. Wildey Savings Bank*, 498.

Specific Performance.

Suit in equity for specific performance of an agreement by the defendant to convey real estate to the plaintiff, which was held properly to have been dismissed because the plaintiff had made no tender of the purchase price and the defendant had not waived the necessity of such a tender. *Smith & Rice Co. v. Canady*, 122.

For an Accounting.

Suit in equity between partners for an accounting, in which it appeared that the plaintiff and the defendant were engaged in dealing in the product of a mineral spring company under a contract of agency, that, while the partnership agreement was in force, the defendant secretly procured from the company an extension of the contract of agency for himself individually after the expiration of the contract then in force, which was to expire two weeks before the partnership contract expired, and it was held that the defendant in so doing violated his duty toward the plaintiff as his partner, and that the plaintiff was entitled to an accounting as to the new contract. *Holmes v. Darling*, 303.

Where a woman client of an attorney at law employs him to attend a foreclosure sale of real estate and to purchase the property in her name, and he purchases and holds it for himself, he can be compelled to account to her in a suit in equity. *Rolikatis v. Lovett*, 545.

In such suit the defendant is not entitled to interest on the amount of the price paid by him for the real estate. *Ibid*.

To Relieve from Results of Fraud.

In a suit in equity by a widow against a nephew of her deceased husband to have certain deeds of real estate from her husband to the defendant set aside as a fraud on her marital rights, where it appears that the conveyances complained of were founded on good and valid considerations, it is necessary for the plaintiff to prove not only that the conveyances were made in fraud of her marital rights but also that the defendant knew or had notice of that fact. *Allen v. Allen*, 29.

Application of the foregoing in a case where it was held that the plaintiff had not shown such fraud. *Ibid*.

Suit in equity against an attorney at law, seeking that an absolute assignment to the defendant of a policy of insurance upon the plaintiff's life be declared to have been an assignment for the purpose of securing a loan, and praying for an accounting and a redemption of the policy, in which it was held that

Equity Jurisdiction (continued).

the defendant had sustained the burden, which was upon him, of proving that the assignment was absolute and fairly and honestly consummated. *Manheim v. Woods*, 537.

Suit by a woman client against an attorney at law for an accounting as to certain land which she had employed him to purchase for her but which he fraudulently had purchased and was holding for himself. *Robikatis v. Lovett*, 545.

To enforce Constructive Trust.

See TRUST, *Constructive*.

Suit against Executor or Administrator.

In this Commonwealth a court of equity will not take jurisdiction of a suit against an executor or administrator, who has not fully administered the estate of his testator or intestate, for an accounting, where the objection is seasonably taken and afterwards insisted on that there is a plain, adequate and complete remedy in the Probate Court. *Allen v. Hunt*, 276.

Partnership Matters.

Suit in equity between partners for an accounting, in which it appeared that the plaintiff and the defendant were engaged in dealing in the product of a mineral spring company under a contract of agency, that, while the partnership agreement was in force, the defendant secretly procured from the company an extension of the contract of agency for himself individually after the expiration of the contract then in force, which was to expire two weeks before the partnership contract expired, and in which it was held that the defendant in so doing violated his duty toward the plaintiff as his partner, and the plaintiff was entitled to an accounting upon the new contract. *Holmes v. Darling*, 303.

Equitable Lien.

An agreement made by the plaintiff in an action of tort for conversion, who has obtained a verdict on which no judgment has been entered, with the attorney at law who conducted the case, that the proceeds of the judgment should be taken by the attorney on account of such plaintiff's indebtedness to him for services and disbursements in that and other litigation, was held to create as between the parties a right in the nature of a lien enforceable in equity, so that the claim upon the verdict could not be reached and applied, by a suit under R. L. c. 159, § 3, cl. 7, to the payment of a debt due to another creditor of such plaintiff. *Delval v. Gagnon*, 203.

To enforce Equitable Easement.

A private right of way across a railroad location, constructed and used in accordance with a personal agreement in a deed of a part of the location by the owner of a farm which the location divided, was held enforceable in equity by a successor of the owner of the farm against a successor of the railroad corporation. *Childs v. Boston & Maine Railroad*, 91.

To enforce Equitable Restrictions.

If, at the time that a restriction was placed upon a lot of land providing that no building should be constructed or maintained thereon "other than for a single family or as a double, otherwise called a semi-detached house," a two-family house stood thereon, a suit in equity may be maintained to prevent the alteration of the two-family into a three-story tenement house, regardless of the extent to which the old building entered into its construction. *Allen v. Barrett*, 36.

Facts which were held to warrant a finding that the plaintiff in such a suit was not guilty of laches. *Ibid.*

A mandatory injunction may be issued compelling the removal of structures erected in violation of building restrictions to which the land was subject, although the defendant had received the land by descent and at the time that he erected the structures in question he was not aware of the restrictions, which were in the deed to his ancestor. *Ibid.*

Who may be parties plaintiff in a suit in equity to enjoin the infringement of equitable restrictions, imposed on lots in a tract of land in furtherance of and as a part of a general scheme for the development of the tract as a residential district. *Ibid.*

Where the owner of a tract of land sold certain lots from it, upon which he imposed uniform equitable restrictions, and agreed orally as a part of the consideration for the purchases to impose similar restrictions upon lots subsequently sold from his remaining land, such oral promise is a contract for the sale of an interest in or concerning lands within the meaning of R. L. c. 74, § 1, cl. 4, and cannot be enforced in equity in the absence of a memorandum signed by the party to be charged. *Sprague v. Kimball*, 380.

To reform Deed.

In a suit in equity in which the plaintiff sought a reformation of a mortgage deed of real estate which, he alleged, by a mutual mistake of his mother and himself she had given to him instead of a deed conveying a title in fee simple, a master's findings were held to have been warranted by the evidence, and a decree for the plaintiff, based thereon, was affirmed. *Kennedy v. Poole*, 495.

The statute of frauds has no application to a suit in equity seeking the reformation of a deed of real estate by the striking out of a clause of defeasance inserted by a mutual mistake of the parties. *Ibid.*

Mistake.

In a suit in equity against a savings bank for a rescission of a sale and assignment to the plaintiff of an overdue mortgage of real estate and for a return to plaintiff of the purchase money, it was held that the evidence warranted the findings that there had been a mutual mistake as to the property covered by the mortgage, that the plaintiff had not been guilty of negligence in relying upon representations of the defendant's president, and that the defendant could be put *in statu quo*, so that the plaintiff was entitled to relief. *Shapira v. Wildey Savings Bank*, 498.

Suit in equity in which the plaintiff sought a reformation of a mortgage deed

Equity Jurisdiction (continued).

of real estate which, he alleged, by a mutual mistake of his mother and himself she had given to him instead of a deed conveying a title in fee simple. *Kennedy v. Poole*, 495.

To compel Completion of Imperfect Conveyance.

In a suit by a trustee under the will of one of two sisters, who were joint trustees of certain real estate for their own benefit, to compel the children of the other sister, who had sold to the first sister her interest in the real estate, to make formal conveyance of the property which such sister ineffectually had attempted to convey, it was held that after the sale the purchasing sister held the interest of her sister in the real estate absolutely and was not required to pay any income from that to her sister's children. *Coates v. Lunt*, 401.

In the same suit it also was held that for any failure on the part of the first sister to distribute properly the income of the remaining trust property, there was ample remedy in the Probate Court so that such failure furnished no equitable reason for depriving the plaintiff of the proper conveyance of the real estate. *Ibid.*

Rescission.

In a suit in equity against a savings bank for the rescission of a sale and assignment to the plaintiff of an overdue mortgage of real estate and a return to the plaintiff of the purchase money, it was held that the evidence warranted findings that there had been a mutual mistake as to the property covered by the mortgage, that the plaintiff had not been guilty of negligence in relying upon representations of the defendant's president, and that the defendant could be put *in statu quo*, so that the plaintiff was entitled to relief. *Shapira v. Wildey Savings Bank*, 498.

To set aside Tax Deed.

In a suit in equity by a tenant in common of certain land to set aside a tax deed of the land on the ground that the taxes, for the nonpayment of which the land was sold, were invalid because they were assessed severally upon the undivided interests of the tenants in common, where it appeared that this erroneous method of assessment was adopted at the request of the plaintiff and his co-tenants and that after the error was discovered the land was reassessed properly, it was held, that, if the plaintiff within a time named should pay the taxes thus properly reassessed, the tax deed should be declared void; otherwise, that the bill should be dismissed. *Curtiss v. Sheffield*, 239.

To redeem from Tax Sale.

A suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale of which the plaintiff had notice less than four months before the filing of the bill, may be brought by a prior attaching and judgment creditor of the owner to whom the tax was assessed, the words in § 61, "any person having an interest in any such land," including an attaching creditor, whether the word "owner" in § 59 includes an attaching creditor or not. *Union Trust Co. v. Reed*, 199.

In such a suit against the owner, the purchaser at the tax sale and two other attaching creditors, it was held that the defendant attaching creditors could be given relief only upon their filing cross bills and showing themselves to be entitled to it. *Union Trust Co. v. Reed*, 199.

To remove Cloud from Title.

The owner of a strip of land, of which a city unlawfully has taken possession under an attempted taking for an unauthorized purpose, cannot maintain a suit in equity against the city to remove the cloud upon his title, because he is not in possession of the land and also because he has adequate remedies at law. *Preston v. Newton*, 483.

To reach and apply Equitable Assets.

It was assumed, without deciding it, that a claim upon a verdict against a defendant in an action of tort for the conversion of personal property, on which no judgment has been entered, is property, which, in a suit in equity brought under R. L. c. 159, § 3, cl. 7, by a creditor of the plaintiff in the action of tort, can be reached and applied to the payment of a debt due from such plaintiff. *Delval v. Gagnon*, 203.

An agreement made by the plaintiff in an action of tort for conversion, who has obtained a verdict on which no judgment has been entered, with the attorney at law who conducted the case, that the proceeds of the judgment should be taken by the attorney on account of such plaintiff's indebtedness to him for services and disbursements in that and other litigation, was held to create as between the parties a right in the nature of a lien enforceable in equity, so that the claim upon the verdict could not be reached and applied by a suit under R. L. c. 159, § 3, cl. 7, to the payment of a debt due to another creditor of such plaintiff. *Ibid*.

Multiplicity of Suits.

In an action upon a bond given by the defendant to the plaintiff for the performance by a corporation of a contract of sale of a storage battery to the plaintiff, the corporation not being a party either to the bond or to the action, where it appeared that the corporation might have a claim against the plaintiff for delay in returning the battery and want of care of it, the question, whether the defendant could maintain a suit in equity to compel the corporation to enforce such claim for the defendant's protection, was referred to as a question on which no opinion was expressed. *Graham v. Middleby*, 437.

Mandatory Injunction.

A mandatory injunction properly may be issued compelling the removal of structures erected upon land in violation of building restrictions to which the land was subject, although the defendant had received the land by descent and at the time that he erected the structures in question he was not aware of the restrictions, which were in the deed to his ancestor. *Allen v. Barrett*, 36.

EQUITY PLEADING AND PRACTICE.

Parties.

Who may be parties plaintiff in a suit in equity to enjoin the infringement of equitable restrictions, imposed on lots in a tract of land in furtherance and as a part of a general scheme for the development of the tract as a residential district. *Allen v. Barrett*, 36.

Cross Bill.

The proper way for a defendant in equity to obtain affirmative relief is by a cross bill. *Union Trust Co. v. Reed*, 199.

Consolidation of Cases.

Discussion by RUGG, C. J., of three different methods by which cases at law and in equity may be consolidated. *Lumiansky v. Tessier*, 182.

Consolidation of a suit in equity by a lessee against his lessor to enjoin the defendant from collecting any rent until he should perform the covenants and conditions of the lease according to the contentions of the plaintiff, and an action at law by the lessee against the lessor for damages from an alleged breach of the covenants of the lease, and an action at law by the lessor jointly against the lessee and a guarantor of the rent for damages for the alleged breach of the covenant to pay rent, where the consolidation was held to be merely for convenience of trial, the two actions at law not having become merged in the suit in equity but still being pending, so that the separate judgments properly could be given in them. *Ibid.*

Master's Report.

A judge who hears a suit in equity upon a master's report has a right to draw inferences warranted by the facts reported by the master, although such inferences are contrary to an inference reported as a finding by the master. *Smith v. Kenney*, 6.

Findings of a master on unreported evidence, from which, it was held, no inference could be drawn of knowledge on the part of the defendant of certain fraud practised on the plaintiff by her husband. *Allen v. Allen*, 29.

Findings of Judge.

A judge who hears a suit in equity upon a master's report has a right to draw inferences warranted by the facts reported by the master, although such inferences are contrary to an inference reported as a finding by the master. *Smith v. Kenney*, 6.

Petition for Review.

If a judge of the Superior Court, after hearing a petition for a review of a final decree in a suit in equity, finds facts adverse to the allegations of the petition, such findings are not open to revision upon an appeal by the petitioner. *Day v. Mills*, 585.

Decree.

A certain rescript of this court in a suit in equity in the Superior Court for the redemption of certain land from a mortgage, directing that the final decree for the plaintiff be modified by giving to the defendant costs, and that the decree as thus modified was to stand, was held not to be a decree, but to be an order for a decree, leaving in the Superior Court, under R. L. c. 173, § 48, power so to amend the former decree as to determine as of the date of the final disposition of the suit the obligations of the defendant to the plaintiff in the matter involved in the suit. *Day v. Mills*, 585.

In a suit in equity by a tenant in common of certain land to set aside a tax deed of the land on the ground that the taxes, for the non-payment of which the land was sold, were invalid because they were assessed severally upon the undivided interests of the tenants in common, where it appeared that this erroneous method of assessment was adopted at the request of the plaintiff and his co-tenants and that after the error was discovered the land was reassessed properly, it was held, that, if the plaintiff within a time named should pay the taxes thus properly reassessed, the tax deed should be declared void; otherwise, that the bill should be dismissed. *Curtiss v. Sheffield*, 239.

Appeal.

If a judge of the Superior Court, after hearing a petition for a review of a final decree in a suit in equity, finds facts adverse to the allegations of the petition, such findings are not open to revision upon an appeal by the petitioner. *Day v. Mills*, 585.

ESCALATOR.

Action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, in which it was held that there was no evidence that the defendant was responsible for the adoption or use of the escalator in question, as it was adopted and installed by the Boston Transit Commission. *Theall v. Boston Elevated Railway*, 327.

ESTOPPEL.

One who knowingly allows himself to be held out as a member of a trading partnership is liable for an indebtedness of the apparent partnership to one who by such holding out honestly has been misled into giving credit to such apparent partnership. *Phipps v. Little*, 414.

In an action against two defendants as copartners, on a promissory note which was signed in the partnership name by one of them, where the other defendant contends that before the note sued upon was negotiated he directed the defaulted defendant to borrow no more money from the plaintiff, evidence to that effect rightly is excluded unless it also is shown that the plaintiff had notice of such limitation of authority or from the circumstances ought to have known of it. *Ibid.*

Where a woman entrusted to her son-in-law for safe keeping certain non-negotiable registered bonds and certain negotiable bonds, and the son-in-law, after forging indorsements upon the registered bonds, wrongfully

Estoppel (continued).

pledged them and the negotiable bonds to secure his own debt, in an action against the pledgee by such owner of the bonds for their alleged conversion, it was held, that, even if the plaintiff had been careless in entrusting her bonds to the pledgor for safe keeping, which it did not appear that she was, this would not have helped the defendant, as the plaintiff owed him no duty to keep her securities carefully. *Varney v. Curtis*, 309.

EVIDENCE.

Presumptions and Burden of Proof.

For cases involving the principle of *res ipsa loquitur*, see NEGLIGENCE, *Res ipsa loquitur*.

Presumption as to correctness of judicial records. *Cote v. New England Navigation Co.* 177.

When it is within the power of a party to an action to explain things apparently telling against him and he fails to make the explanation, the inference properly may be drawn that no truthful explanation will help him. *D'Addio v. Hinckley Rendering Co.* 465.

Where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended. *Russell v. Lilly*, 529.

Cases in which it was held that on the evidence the existence of material facts was left a matter of conjecture, see *post*, *Matters of Conjecture*.

A judge who hears a suit in equity upon a master's report has a right to draw inferences warranted by the facts reported by the master, although such inferences are contrary to an inference reported as a finding by the master. *Smith v. Kenney*, 6.

Rules as to the burden of proof in an action upon a promissory note where the defense is that the note was procured by fraud of the payee and without consideration. *Lewiston Trust & Safe Deposit Co. v. Shackford*, 432.

Evidence, at the trial of an action in which a material issue was, whether a gong was rung on a street car, which was held to warrant a jury in finding that the gong was not sounded. *Lucarelli v. Boston Elevated Railway*, 454.

In an action of tort for personal injuries, where the direct testimony of the plaintiff, with the other evidence in the case, warrants a verdict for the plaintiff, if there is a discrepancy between some of the answers of the plaintiff on his cross-examination and his direct testimony, this is a matter for the jury to weigh and consider and does not justify the presiding judge in ordering a verdict for the defendant. *Wilkins v. Boston & Northern Street Railway*, 265.

In an action of contract, where the only defense relied upon is that the plaintiff received full satisfaction of his claim upon a judgment obtained by him in a previous action against a different defendant, the burden of proving such defense is upon the defendant, and it is not enough for him to show by the record in the former action that the issue in question might have been litigated and decided in that action. In order to prevail he must show that in the former action the same issue was in fact litigated and determined. *Cote v. New England Navigation Co.* 177.

Case where it was held such defense was not made out on the evidence. *Ibid*. Principles as to the burden of proof which apply to an action for money

had and received to recover the amount of a deposit made at an auction sale at which the plaintiff was declared to be the purchaser of certain real estate under an agreement that, if the title was not good, there would be no sale and the money would be refunded. *Foster, Hall & Adams Co. v. Sayles*, 319.

Admissions and Confessions.

Where land is taken by a city under statutory authority for the widening of a highway, and the owner of such land has filed and prosecuted a petition for damages for the taking, such owner by the prosecution of his petition admits that the proceedings for the taking of his land were legal and regular, and the remedy provided by the statute for compensation is exclusive. *Preston v. Newton*, 483.

At the trial of an action against a milling company for a breach of a contract in writing for the sale to the plaintiff of a certain quantity of meal, the contract providing that the plaintiff might store any portion of the meal in the defendant's mill at his own risk for a certain period, it appeared that the mill was burned before all the meal was called for by the plaintiff and the defendant, contending that the title to the meal had passed to the plaintiff before the fire, offered evidence, which was excluded, that the plaintiff had taken out policies of insurance upon "grain" while stored in the defendant's mill, and it was held that the exclusion of the evidence was proper, as the act of the plaintiff in procuring insurance was not inconsistent with title to the meal being in the defendant. *Chandler Grain & Milling Co. v. Shea*, 398.

Competency.

In an action on a promissory note, where the defense relied upon is that the plaintiff is not a holder in due course and that the note was procured from the defendant through fraud on the part of an agent of the payee, the defendant may show the dealings between him and the agent of the payee, in which he contends that the fraud was committed, and for this purpose may introduce in evidence a letter received by him from such agent which constitutes a part of the transaction alleged to be fraudulent, without showing that the plaintiff when he took the note had any notice of the contents of such letter. *Lewiston Trust & Safe Deposit Co. v. Shackford*, 432.

Remoteness.

At the trial of an action against a town for personal injuries alleged to have been sustained by reason of depressions in a public way, which caused the carriage of the plaintiff to tip and throw him out, evidence that on previous days other wagons had been seen to go up and down and tip at the same place is inadmissible for the purpose of showing a defect in the way or to prove notice of the defect to the defendant. *Williams v. Winthrop*, 581.

In an action against a corporation operating a street railway for causing the death of the plaintiff's intestate, it is proper to exclude upon the issue of damages a question, "What have you noticed as to cars going along that particular stretch?" *Mahoney v. Boston Elevated Railway*, 196.

At the trial of an action against a railroad company under St. 1906, c. 463, Part II, § 247, for damages resulting from the destruction of a barn of the

Evidence (continued).

plaintiff by fire alleged to have been communicated by a locomotive engine of the defendant, evidence offered by the defendant, tending to prove that at the time of the fire a son of the plaintiff was at home, who when a young boy had had a strong inclination to set fires and had set several, that in the autumn following the burning of the plaintiff's barn several fires occurred within a mile of the plaintiff's barn and that the plaintiff's son at the time such fires were discovered was very near to them, was held rightly to have been excluded as too remote and as presenting collateral issues. *Noyes v. Boston & Maine Railroad*, 9.

Extrinsic affecting Writings.

Where a will provided that certain legacies should be paid from the money of the testatrix deposited in the Worcester Five Cents Savings Bank, it was held that facts could be shown by extrinsic evidence from which it could be found that the testatrix intended to designate the Worcester County Institution for Savings. *Bullard v. Leach*, 117.

When on the face of a deed of land no uncertainty is disclosed as to the monuments or boundaries described, but the description is shown to be ambiguous when it is applied on the land to the monuments referred to, extrinsic evidence is admissible to show what boundaries the language of the deed was intended to describe. *Temple v. Benson*, 128.

Extrinsic affecting Officer's Return.

In proving, at the trial of an action under the employer's liability act, that the defendant was the employer of a workman killed by alleged negligence of the defendant, the plaintiff may be allowed to show by the oral testimony of the officer who made service of the notice required by the statute, that he served the notice upon the defendant in a certain office, near the door of which was a sign bearing the defendant's name, this being material to show that the defendant still was doing business at the time that the workman was killed, and being a matter apart from the officer's official return of service of the notice. *Beauregard v. Benjamin F. Smith Co.* 259.

Matters of Conjecture.

Customer who slipped upon a piece of meat on the floor of a market was held not to be able to recover against the proprietor of the market where the cause of the presence of the meat on the floor was left a matter of conjecture. *Norton v. Hudner*, 257.

In an action against the proprietor of a cotton mill for causing the instant death of a back boy in its employ, who was struck and killed by the counterweight of an elevator, it was held that, because the conduct of the boy before and during the opening of certain trap doors was a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident and consequently that the action could not be maintained. *Taylor v. Pierce Brothers*, 247.

At the trial of an action at common law against a street railway company by an employee who was injured in a car barn by being run into by a shifting table which started unexpectedly as he was passing in front of it in the course

of his duties, it was held that a verdict properly was ordered for the defendant, because the evidence left it a matter of conjecture whether the table started automatically because of a defect in it or whether the starting was due to the negligence of the fellow servant. *Ridge v. Boston Elevated Railway*, 460.

And it therefore was held that the exclusion of evidence, offered by the plaintiff to show what might cause the table to start automatically, and also of evidence offered to show that the fellow servant before the accident had said that there was a defect in the table, was immaterial. *Ibid*.

Declarations of Deceased Persons.

In an action for the obstruction of a right of way alleged to have been acquired by prescription, certain evidence was held rightly to have been admitted of a conversation between the deceased predecessor in title of the defendant and the husband of the plaintiff's predecessor in title, tending to show that the use of the way by the plaintiff's predecessor in title was permissive and not adverse. *Daw v. Lally*, 578.

Dying Declarations under R. L. c. 175, § 65.

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman, in consequence of which she died, a statement by the woman, that the defendant had performed an "abortion" upon her, and other statements referring to "the abortion" properly may be admitted as parts of her dying declarations under R. L. c. 175, § 65, because the word "abortion" does not of itself import a charge of any criminal intent and such statements may be regarded as statements of fact rather than of opinion. *Commonwealth v. Smith*, 563.

Statement to Physician.

What statements, made by a woman to her attending physician, are admissible in evidence at the trial of an indictment for an unlawful attempt to procure a miscarriage of the woman. *Commonwealth v. Smith*, 563.

Relevancy and Materiality.

In an action against two defendants as copartners on a promissory note which was signed in the partnership name by one of the defendants, where the other defendant contends that, before the note was negotiated, he directed his partner to borrow no more money from the plaintiff, evidence to that effect rightly is excluded unless it also is shown that the plaintiff had notice of such limitation of authority or from the circumstances ought to have known of it. *Phipps v. Little*, 414.

Where, in such action, one defendant contends that the other defendant was not his partner but was employed by him under a contract by which he was to receive a percentage of the profits of the business as compensation for his services, evidence, offered by the defendant so contending to show that he made a contract with another person by which such other person

Evidence (continued).

was to receive a percentage of the profits in addition to his weekly compensation, properly is excluded as immaterial. *Phipps v. Little*, 414.

Where the respondent in a petition to enforce a mechanic's lien contends that there were omissions and defects in the performance of the petitioner's contract which could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, he may ask an expert witness at the hearing on the petition what in his opinion would be the fair cost of remedying such conditions so that they would comply with the specifications, such evidence being competent upon the issue, whether there had been a substantial performance of the contract. *Pelatoski v. Black*, 428.

At the trial of an action of contract against a milling company for failure to perform a contract for the sale by the defendant to the plaintiff of a certain quantity of meal, the plaintiff "to have free storage for any portion of" the meal for a specified time at his own risk as far as fire was concerned, where it appeared that a fire destroyed the defendant's mill before the plaintiff had called for the quantity of meal designated in the contract and that no meal or corn had been set apart for the plaintiff at any time, evidence of a trade custom to the effect that corn was spoken of as meal, and that when meal was sold it was sold in the grain with the understanding that it should be ground into meal shortly before delivery, was held rightly to have been excluded. *Chandler Grain & Milling Co. v. Shea*, 398.

In an action by a workman against his employer for personal injuries alleged to have been sustained by reason of a defect in complicated machinery, where an expert called by the plaintiff has testified that the movement of the machine which caused the injury was abnormal and unexpected, such witness should not be allowed to testify further that such movement of the machine might have been avoided by the adoption of a certain device, because the defendant owed the plaintiff no duty to change the character of the machinery that was in use when the plaintiff's employment began, and the admission of such evidence against the defendant's exception is a material error. *Rivers v. Richard*, 515.

In an action for alleged false and fraudulent representations in regard to the net profits of the business of a moving picture theatre whereby the plaintiff was induced to purchase the business, where the plaintiff has introduced evidence that while the negotiations for the purchase were in progress the defendant for the purpose of influencing the plaintiff procured a fictitious attendance at the theatre through an extensive distribution of free tickets, the plaintiff may testify that immediately after the purchase the attendance at the theatre fell off, this having a tendency to show the extent of the fictitious stimulation of patronage by the defendant just before the sale. *Noyes v. Meharry*, 598.

In an action for the alleged breach of a contract to employ the plaintiff as the general manager of a paper mill for a period of five years, where the contract provided that, in case the plaintiff's work as general manager should not be satisfactory, the defendant might give him other work instead, and where it appears that the defendant gave notice to the plaintiff of such change of work and that the plaintiff declined to accept such change, the defendant under an answer alleging a general denial may introduce evidence of damages suffered by the defendant through mismanagement by the plaintiff as tending to show that the plaintiff was deposed justifiably. *Bennett v. Kupfer Brothers Co.* 218.

Opinion: experts.

Where it is a material issue for the jury which of two corporations was doing certain work in which a workman was injured, the superintendent of the person for whom the work was being done, who says that he has personal knowledge on the subject, should not be allowed to testify to his conclusion as to who was doing the work, although he properly may be allowed to state all the facts and circumstances within his knowledge bearing upon this question. *Beauregard v. Benjamin F. Smith Co.* 259.

At the argument of an exception to the admission of certain testimony given by a witness called as an expert in regard to an alleged defect in complicated machinery, the objection is not open that the witness had not sufficient knowledge either of the general subject or of the particular mechanism, if no question in regard to the qualification of the witness as an expert was raised at the trial. *Rivers v. Richards*, 515.

The rule, that a witness not an expert may be allowed to state a conclusion of fact at the time of his observation in regard to matters which are capable of being understood by men in general and which cannot be reproduced before the jury as they appeared to the witness, does not make admissible the conclusion of a witness as to the kind of fire that would produce the conditions that he observed when he examined a certain building. *Commonwealth v. Rodziewicz*, 68.

The opinion of an expert, at the trial of an indictment for wilfully and maliciously burning a building occupied in part by the defendant, as to the kind of fire that would char an ordinary mop-board, sheathing and partition and burn holes in an ordinary wooden floor without any charring or burning between the different surfaces, is inadmissible. *Ibid.*

In an action for personal injuries from being hit by the head of a hammer that came off the handle, a witness, who is qualified as an expert, may be asked the question, "What causes a hammer to fly off the handle when the same is being used in the usual and proper way?" and may answer, "It would be improperly wedged. The continual striking would jar it off," it being within the discretion of the presiding judge to admit the question and answer if he thinks that they will or may be of assistance to the jury. *Sprague v. General Electric Co.* 375.

Where the respondent in a petition to enforce a mechanic's lien contends that there were omissions and defects in the performance of the petitioner's contract which could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, he may ask an expert witness at the hearing on the petition what in his opinion would be the fair cost of remedying such conditions so that they would comply with the specifications, such evidence being competent upon the issue, whether there had been a substantial performance of the contract. *Pelatoski v. Black*, 428.

Judicial Records.

In an action in which the proceedings at the trial of a previous action in a court of record are material, the judge or magistrate before whom the previous action was tried cannot be allowed to testify that a certain motion was made at that trial which the record does not show to have been made. *Cote v. New England Navigation Co.* 177.

Of Identity.

It seems, that, where a record of conviction of a crime is offered in evidence to impeach the credibility of a witness, the mere fact that the name of the person convicted is the same as that of the witness does not make the record admissible without corroborating evidence of identity. *Ayers v. Ratskesky*, 589.

At the trial of an action of tort for personal injuries from being run into by an automobile of the defendant by reason of the negligence of the defendant's servant who was driving the automobile, certain evidence, combined with the identity of the name of the defendant's servant and of the person shown by a court record to have been convicted of a crime, was held to warrant an inference that the court record applied to the defendant's driver, and accordingly that such record was admissible to impeach his credibility as a witness. *Ibid.*

Where it is a material issue for the jury which of two corporations was doing certain work in which a workman was injured, the superintendent of the person for whom the work was being done, who says that he has personal knowledge on the subject, should not be allowed to testify to his conclusion as to who was doing the work, although he properly may be allowed to state all the facts and circumstances within his knowledge bearing upon this question. *Beauregard v. Benjamin F. Smith Co.* 259.

In proving that the defendant was the employer in such case, the plaintiff may be allowed to show by the oral testimony to the officer who made service of the notice required by the statute, that he served the notice upon the defendant in a certain office, near the door of which was a sign bearing the defendant's name, this being material to show that the defendant still was doing business at the time that the workman was killed, and being a matter apart from the officer's official return of service of the notice. *Ibid.*

Of Adverse Possession.

See ADVERSE POSSESSION.

Of Custom.

See CUSTOM.

Self serving Acts.

At the trial of an action against a milling company for a breach of a contract in writing for the sale to the plaintiff of a certain quantity of meal, the contract providing that the plaintiff might store any portion of the meal in the defendant's mill at his own risk for a certain period, it appeared that the mill was burned before all the meal was called for by the plaintiff, and the defendant, contending that the title to the meal had passed to the plaintiff before the fire, offered evidence, which was excluded, that the defendant had stricken from its claims under its policies of insurance any claim for the loss of the grain sold to the plaintiff, and it was held that the exclusion of the evidence of the conduct of the defendant as to its insurance was proper, as such action was analogous to a declaration in its own interest after the rights of the parties had been fixed by the contract. *Chandler Grain & Milling Co. v. Shea*, 398.

Res inter Alios.

At the trial of an action against a railroad company for loss by fire alleged to have been communicated by a locomotive engine of the defendant, evidence of an order of a district court, in a proceeding to which the plaintiff was not a party, ordering the committal of a son of the plaintiff to a hospital on the ground that he had a mania for setting fires, was held to be inadmissible. *Noyes v. Boston & Maine Railroad*, 9.

Res ipsa loquitur.

See that subtitle under NEGLIGENCE.

EXECUTOR AND ADMINISTRATOR.

The fact that one, who was named and has been appointed executor of a will and to whom as a trustee property was given by the will, having given a bond as executor, fails to procure his formal appointment or to give a bond as such trustee, does not show conclusively that he has declined to act in that capacity; and therefore a sale by him of trust property is not necessarily void solely for that reason. *Coates v. Lunt*, 401.

In this Commonwealth a court of equity will not take jurisdiction of a suit for an accounting against an executor or administrator, who has not fully administered the estate of his testator or intestate, where the objection is seasonably taken and afterwards insisted on that there is a plain, adequate and complete remedy in the Probate Court. *Allen v. Hunt*, 276.

A contract under seal for the sale to a testator of certain securities, which provided for payment ninety days from the date of the contract in part in cash and in part by the testator's interest bearing promissory notes, and for the deposit within the ninety days as escrows with a trust company of all the documents to be paid or delivered by either party to the other, and which closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties, "as to each and all of its provisions, whether so expressed in appropriate words or not," was held, upon the death of the testator forty-two days after the date of the contract without having made any of the deliveries called for by the contract, not to be enforceable against the executor of his will. *Browne v. Fairhall*, 290.

And it also was held that the express stipulation that the contract should bind the heirs, executors and administrators of the parties referred only to the performance of the obligations growing out of the contract after all the papers and instruments required by it had been delivered as escrows to the trust company. *Ibid.*

EXPLOSIVES.

Negligence in use of, see NEGLIGENCE, *In Use of Explosives.*

FALSE IMPRISONMENT.

In an action against a police officer for alleged false imprisonment in detaining the plaintiff in custody for an unreasonable time without bringing him

False Imprisonment (continued).

before a magistrate after having arrested him upon probable cause to believe that he had committed a felony, where the facts in regard to the circumstances of the detention are not agreed, it cannot be ruled as a matter of law that a delay of an hour and a quarter was reasonable. *Keefe v. Hart*, 476.

FALSE REPRESENTATIONS.

It is not the tendency of the law to-day to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk. By RUGG, C. J. *Noyes v. Meharry*, 598.

See also DECEIT.

FIRE.

Insurance against loss by fire, see INSURANCE, *Fire*.

Opinion evidence as to the kind of fire that would char an ordinary mopboard, sheathing and partition and burn holes in an ordinary wooden floor was held to be inadmissible at the trial of an indictment for wilfully and maliciously burning a building. *Commonwealth v. Rodziewicz*, 68.

FRAUD.

Rules as to the burden of proof in an action upon a promissory note where the defense is that the note was procured by fraud of the payee and without consideration. *Lewiston Trust & Safe Deposit Co. v. Shackford*, 432.

Evidence admissible in such case to prove the fraud. *Ibid*.

In a suit in equity by a widow against a nephew of her deceased husband to have certain deeds of real estate from her husband to the defendant set aside as a fraud on her marital rights, where it appears that the conveyances complained of were founded on good and valid considerations, it is necessary for the plaintiff to prove not only that the conveyances were made in fraud of her marital rights but also that the defendant knew or had notice of that fact. *Allen v. Allen*, 29.

Application of the foregoing in a case where it was held that the plaintiff had not shown such fraud. *Ibid*.

Other suits in equity to relieve from results of fraud, see EQUITY JURISDICTION, *To relieve from Results of Fraud*.

FRAUDS, STATUTE OF.

The statute of frauds has no application to a suit in equity seeking the reformation of a deed of real estate by the striking out of a clause of defeasance inserted by a mutual mistake of the parties. *Kennedy v. Poole*, 495.

An action, for a breach by a mortgagee of real estate of an oral agreement by him that, if the mortgagor would refrain from bidding at a foreclosure sale of the property, the mortgagee would bid in the property and afterwards would sell it at private sale and would pay to the mortgagor any balance that remained over the amount of the mortgage with interest and expenses, was held not to be barred by the statute of frauds. An action by a mortgagor of real estate to recover a balance in the hands of the mortgagee after a foreclosure sale, where such balance was held by the mortgagee as the result of a contract with the mortgagor for the sale of the real estate,

was held not to be barred by the statute of frauds because the sale had been performed and the promise to pay over the excess was separable from the rest of the contract. *Zwicker v. Gardner*, 95.

Where the owner of a tract of land sold certain lots from it, upon which he imposed uniform equitable restrictions, and agreed orally as a part of the consideration for the purchases to impose similar restrictions upon lots subsequently sold from his remaining land, such oral promise was held to be a contract for the sale of an interest in or concerning lands within the meaning of R. L. c. 74, § 1, cl. 4, which could not be enforced in equity in the absence of a memorandum signed by the party to be charged. *Sprague v. Kimball*, 380.

GIFT.

Evidence which was held to warrant findings that two deposits made by one P in a savings bank, one under the title, "P payable in case of his death to K," and the other under the title, "K payable in case of her death to P," were given by P to K before P's death. *Wade v. Smith*, 34.

The transfer of certain shares of the capital stock of a corporation by the owner to a person who signed a certain memorandum, was held not to constitute such person a trustee, and it was held that he was merely an agent for the owner, so that an attempted gift to another person designated in the memorandum to take effect after the death of the owner was void, and the executor of the will of the owner was entitled to the shares. *Russell v. Webster*, 491.

Execution, by a woman about to undergo a surgical operation which she believed she would not survive, of an assignment of a savings bank deposit to her stepson, and delivery of the bank book and assignment to an attorney at law to be sent to the stepson in case of her death, were held not to constitute a *donatio causa mortis*, where it was understood between the woman and the attorney that he was to hold the documents as her agent and not as the agent of the stepson. *Stratton v. Athol Savings Bank*, 46.

GRADE CROSSING ACTS.

In proceedings under a special statute for the abolition of certain grade crossings, which incorporates by reference, except as otherwise provided, the provisions of St. 1900, c. 387, and acts in amendment thereof, "the total actual cost" of the alterations which is to be apportioned among the contributing parties is the whole amount expended on the entire work with such allowances and deductions, if any, as should be made in order to arrive at a correct result. *Mayor & Aldermen of Worcester v. Boston & Albany Railroad*, 567.

Therefore an auditor appointed in such a proceeding under the provisions of St. 1900, c. 387, § 7, is not bound to allow as such actual cost expenditures of a railroad corporation, made in doing the work imposed upon it by a decree of the Superior Court, merely because such expenditures were made honestly and in good faith, unless the railroad corporation also exercised due care and diligence to protect the interests of the contributing parties. *Ibid*.

The report of such an auditor has the force and effect of the report of a master in a suit in equity, and where the evidence is not reported his find-

Grade Crossing Acts (*continued*).

ings cannot be set aside unless they are plainly inconsistent with facts found by him and are clearly wrong. *Mayor & Aldermen of Worcester v. Boston & Albany Railroad*, 567.

Proceedings with regard to the abolition of grade crossings in Worcester. *Ibid.*

HIGHWAY.

See *WAY, Public*.

HUSBAND AND WIFE.

As to divorce, and the validity of marriages, see *MARRIAGE AND DIVORCE*.

The interest of a husband and wife in real estate held by them as tenants by the entirety cannot be severed, and a petition for the partition of such property will not lie. *Hoag v. Hoag*, 50.

Under a deed of real estate to a husband and wife, described as such, made after St. 1885, c. 237, by the habendum clause of which the grantees are to hold the property "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own use and behoof for ever," the grantees take not as simple joint tenants but as tenants by the entirety. *Ibid.*

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, the widow of a man who died intestate without issue takes a one half interest in real estate in which her husband at the time of his death had a vested remainder, subject to a life estate that terminated after his death. *Walden v. Walden*, 418.

Case in which certain acts of a husband were held to have been done as agent for his wife. *Daw v. Lally*, 578.

Money lent by a woman, as the administratrix of an estate, to a man whom she afterwards marries may be recovered from her husband by one to whom she has assigned the claim after her marriage. *Delval v. Gagnon*, 203.

Rights of one to whom the payee of a negotiable promissory note, after indorsing it to the payee's wife, delivers it. *Nelson v. Piper*, 531.

In a suit in equity by a widow against a nephew of her deceased husband to have certain deeds of real estate from her husband to the defendant set aside as a fraud on her marital rights, where it appears that the conveyances complained of were founded on good and valid considerations, it is necessary for the plaintiff to prove not only that the conveyances were made in fraud of her marital rights but also that the defendant knew or had notice of that fact. *Allen v. Allen*, 29.

Application of the foregoing in a case where it was held that the plaintiff had not shown such fraud and knowledge. *Ibid.*

ICE.

See *SNOW AND ICE*.

INSURANCE.

Fire.

The provision of St. 1907, c. 576, § 21, to the effect that no misrepresentation or warranty made in the negotiation of a policy of insurance by the assured

shall be deemed material or avoid the policy unless it is made with actual intent to deceive or unless the matter misrepresented increases the risk of loss, has no application to a warranty contained in the body of a policy. *Elder v. Federal Ins. Co.* 389.

Application of the foregoing to a policy insuring against loss or damage to an automobile by fire. *Ibid.*

Rule to be applied under the "other insurance" provision in the Massachusetts standard form of fire insurance policy, in apportioning the amounts to be paid for damage by fire to a double building, the two parts of which were damaged unequally, between "blanket" policies for a certain amount on the whole of the building and a policy for a specific amount on each half of the building. *Taber v. Continental Ins. Co.* 487.

Of Automobile.

A breach, by the owner of an automobile insured for a year against loss or damage by fire, of a provision of the policy warranting that the automobile would not be used for carrying passengers for hire or be leased, was held to preclude a recovery for damage to the automobile by a fire occurring after the breach. *Elder v. Federal Ins. Co.* 389.

It also was held that in such case the owner was not entitled to a return of any premium paid upon the policy, as the policy had attached and only by his own act was he deprived of its full benefit. *Ibid.*

INTEREST.

In a suit in equity by a woman against an attorney at law for an accounting for the income and profits derived from certain real estate, which the plaintiff had employed the defendant to purchase for her and which he wrongfully had purchased for his own benefit, the defendant is not entitled in such accounting to be allowed interest on the amount of the price paid by him for the real estate. *Rolikatis v. Lovett*, 545.

INTERROGATORIES.

See PRACTICE, CIVIL, *Interrogatories*.

INTOXICATING LIQUORS.

In assuming for the purposes of decision, that money paid for a license to sell intoxicating liquors can be recovered in an action of contract upon proof that the license for which the money was paid was void *ab initio*, it was said by the court that this point never has been decided in this Commonwealth. *Brown v. Nahant*, 271.

If a tenant of the United States occupying a building on land of the United States, chooses to apply to the selectmen of the town on which the property is situated for a license to sell intoxicating liquors and is granted such a license, he cannot afterwards recover the money he voluntarily paid for the license, whether or not he lawfully could have carried on his business without a license. *Ibid.*

Intoxicating Liquors (continued).

Acts of selectmen of a town, in granting licenses to sell intoxicating liquors, and of the treasurer of the town in receiving the license fee and in paying a portion thereof into the town treasury, are acts of public officers and not of officers of the town. *Brown v. Nahant*, 271.

Such a licensee therefore cannot recover from the town the amount of a license fee on the ground that he paid it under a mistake of fact, because there was no transaction between the town and the licensee, and because a town cannot be held liable for the act of a public officer, although enjoying the advantage of it, unless a remedy is given by statute. *Ibid.*

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance during the same period of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

JOINT TENANTS AND TENANTS IN COMMON.

Where land is owned by tenants in common the assessment of a tax upon an undivided interest of one of the tenants in common is invalid. *Curtiss v. Sheffield*, 236.

In a suit in equity by a tenant in common of certain land to set aside a tax deed of the land on the ground that the taxes, for the non-payment of which the land was sold, were invalid because they were assessed severally upon the undivided interests of the tenants in common, where it appeared that this erroneous method of assessment was adopted at the request of the plaintiff and his cotenants and that after the error was discovered the land was reassessed properly, it was held, that, if the plaintiff within a time named should pay the taxes thus properly reassessed, the tax deed should be declared void; otherwise, that the bill should be dismissed. *Ibid.*

The interest of a husband and wife in real estate held by them as tenants by entirety cannot be severed, and a petition for the partition of such property will not lie. *Hoag v. Hoag*, 50.

Under a deed of real estate to a husband and wife, described as such, made after St. 1885, c. 237, by the habendum clause of which the grantees are to hold the property "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own use and behoof forever," the grantees take not as simple joint tenants but as tenants by entirety. *Ibid.*

JUDGMENT.

The decision of a police, district or municipal court on a petition under St. 1911, c. 624, to review an order of a mayor removing the petitioner from office, is final, and is not open to review on a petition for a writ of mandamus ordering the reinstatement of the petitioner. *Barnes v. Mayor of Chicopee*, 1.

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance during the

same period of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

At the trial of an action against a railroad company for loss by fire alleged to have been communicated by a locomotive engine of the defendant, evidence of an order of a district court, in a proceeding to which the plaintiff was not a party, ordering the committal of a certain son of the plaintiff's to a hospital on the ground that he had a mania for setting fires, was held to be inadmissible. *Noyes v. Boston & Maine Railroad*, 9.

If on a petition to establish a mechanic's lien the jury finds, upon one of the issues submitted to them which is material to a determination of the validity of the lien, that a certain construction mortgage was not given by the owner of the premises to pay off a prior mortgage and *pro tanto* in substitution for it, the owner and both mortgagees being parties to the petition, such finding is *res judicata* barring an action subsequently brought by the administrator of the estate of the owner against the second mortgagee seeking damages for alleged fraud on his part in taking an assignment instead of a discharge of the prior mortgage and then foreclosing it. *Rochford v. Atkins*, 368.

In an action of contract, where the only defense relied upon is that the plaintiff received full satisfaction of his claim upon a judgment obtained by him in a previous action against a different defendant, the burden of proving such defense is upon the defendant, and it is not enough for him to show by the record in the former action that the issue in question might have been litigated and decided in that action. In order to prevail he must show that in the former action the same issue was in fact litigated and determined. *Cote v. New England Navigation Co.* 177.

Arrest of judgment in criminal cases, see PRACTICE, CRIMINAL, *Arrest of Judgment*.

LACHES.

Delay in filing exceptions in an action at law may constitute laches barring the maintenance of a petition for writ of review. *Welch v. Chase*, 519.
See also that subtitle under EQUITY JURISDICTION.

LANDLORD AND TENANT.

Existence of Relation.

If, in an action against the owner of a tenement house for personal injuries alleged to have been received by one of the family of a tenant because of a defective condition in the ceiling of a passageway used in common by all the tenants, it appears that previous to the injury the defendant had given to another person a lease of the premises which was in force at the time of the injury, and there is no evidence that such lessee had not taken possession of the premises or was not in control of them, it is immaterial what was the defendant's motive in making the lease, and a verdict properly may be ordered for the defendant. *Green v. Pearlstein*, 360.

Municipality as Landlord.

If a town, holding common land within its limits on a bluff facing the sea, which is not required at the time for any public purpose, lays out such land

Landlord and Tenant (continued).

in house lots which it leases to tenants for a substantial rental, this is not *ultra vires*, and the town is liable to one of its tenants, in the same way that a private owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants. *Davis v. Rockport*, 279.

Covenant to install Heat.

A covenant of the lessor in a lease of certain real estate, "that the heating apparatus to be connected with and used in the premises hereby leased and demised shall be installed at the expense of the lessor," does not require a heating apparatus to be installed on the premises, and may be performed by the installation in the cellar of an adjoining building belonging to the lessor of a heating apparatus connected with and sufficient to warm the demised premises. *Lumiansky v. Tessier*, 182.

Effect of Revocation of License.

Under a certain lease of a building for a moving picture show, providing that "a license, for operating" the "show on the premises as now equipped, has been obtained," a revocation of the license, due to failure of the lessee to perform his obligations under the lease as to interior repairs, was held to give him no claim upon the lessor and not to excuse him from his obligation to pay the stipulated rent. *Lumiansky v. Tessier*, 182.

Liability for Personal Injury.

Action against one in control of a tenement house for personal injuries received by the wife of a tenant by reason of plaster falling upon her from the ceiling of a passageway used in common by the tenants, in which it was held that there was evidence of due care on the part of the plaintiff and of negligence on the part of the defendant which made him liable to the plaintiff as a member of the family of a tenant. *Green v. Pearlstein*, 360.

At the trial of an action against a person controlling a building by an employee of one of the tenants therein for personal injuries sustained by a fall from a freight elevator which was furnished by the defendant for use by the tenants, it appeared that the plaintiff had backed off from an unguarded side of the elevator when he might have put up a guard before he entered the elevator, and it was held that as a matter of law the plaintiff was not in the exercise of due care. *Amiot v. Foster*, 573.

Liability of municipality as landlord, *Davis v. Rockport*, 279.

Eviction.

Where the lessor of a theatre during an inspection of the theatre by the State inspector ordered the lessee off the premises and was the aggressor in a controversy with the lessee in which they came to blows and the lessee was expelled, but the lessor did not intend permanently to evict the lessee, his purpose being to keep the lessee away from the inspector rather than out of the building, and the acts of the lessor did not deprive the lessee of the beneficial use of the premises after the inspection, such temporary forcible ex-

pulsion of the lessee does not constitute an eviction. *Lumiansky v. Tessier*, 182.

Summary Process for Possession.

See SUMMARY PROCESS FOR POSSESSION OF LAND.

Action for Rent or for Use and Occupation.

The question, whether a lessor in an action for rent due under a covenant in a lease properly can join as defendants the lessee and one who guaranteed the payment of the rent under a separate instrument, was raised but was not determined. *Lumiansky v. Tessier*, 182.

A revocation of a license owing to the failure of a lessee to make repairs was held to be no defense to an action by the lessor for rent. *Ibid.*

Action for use and occupation of land of the plaintiff upon which a part of an ell of a building of the defendant stood, where it was held that a finding for the plaintiff was warranted, as it might have been inferred from the defendant's conduct that he agreed to become a tenant at the rent of \$1 a day. *Sellers v. Frank*, 298.

LAW OF THE ROAD.

The provision of R. L. c. 54, § 2, that "the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way," applies to the driver of an automobile who is attempting to pass a street railway car travelling in the same direction. *Foster v. Curtis*, 79.

LEGACY.

See DEVISE AND LEGACY.

LEWDNESS.

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance during the same period of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

LICENSE.

For theatrical performances, see *Commonwealth v. McGann*, 213.

For the sale of intoxicating liquors, see INTOXICATING LIQUORS.

Effect on rights of the parties to a certain lease of the revocation of a license for a moving picture show, see *Lumiansky v. Tessier*, 182.

LIEN.

Equitable lien, see that subtitle under EQUITY JURISDICTION.

Mechanic's lien, see that title.

LIMITATIONS, STATUTE OF.

Action by the assignee from the holder of an attested overdue non-negotiable promissory note against its maker, which is brought for the assignee's benefit but in the name of the payee, is not barred under the provision of R. L. c. 202, § 1, cl. 3, if it is brought within twenty years from the date when the note became due. *Pierce v. Talbot*, 330.

LIS PENDENS.

In a summary process under R. L. c. 181, for the possession of certain premises that had been occupied by the defendant under a lease from the plaintiff which had been terminated for non-payment of rent by a notice in writing under R. L. c. 129, § 11, given by the plaintiff to the defendant one month before the date of the writ, it is no defense that an action is pending for the possession of the same premises brought by the plaintiff against the defendant under the same statute in a municipal court about seven months before the date of the writ in the present action in which the plaintiff obtained judgment and the defendant appealed to the Superior Court, filing a bond as required by R. L. c. 181, § 6. *Proctor v. Moran*, 405.

LORD'S DAY.

The appointment on Sunday of an agent to execute on Monday a contract to sell certain land is void as the transaction of secular business on the Lord's day. *Kryzminski v. Callahan*, 207.

MAIL.

Action by a mail clerk for personal injuries caused by a defective mail wagon. *Davis v. Crisham*, 151.

MANDAMUS.

The function of a writ of mandamus directed to a lower court is to compel judicial action by such court and not to direct what that action shall be. *Channell v. Judge of Central District Court*, 78.

Petition by a married woman for a writ of mandamus directed to a judge of a district court to compel him to issue a complaint against the husband of the petitioner for non-support, which was held properly to have been denied under the circumstances. *Ibid*.

The decision of a police, district or municipal court on a petition under St. 1911, c. 624, to review an order of a mayor removing the petitioner from office is final, and is not open to review on a petition for a writ of mandamus ordering the reinstatement of the petitioner. *Barnes v. Mayor of Chicago*, 1.

MARKET.

Case involving the question, whether the proprietor of a market was negligent in the care of the floor of the market. *Norton v. Hudner*, 257.

MARRIAGE AND DIVORCE.

On an appeal from a decree of the Superior Court in favor of a claimant of funds attached by trustee process in an attempted enforcement of a decree for alimony in a libel for divorce, it was held that, the evidence not being before this court, the decree must be affirmed. *Mooney v. Mooney*, 114.

Whether in such a proceeding the rights of an intervenor ought to be considered was not decided, because it did not appear that any objection on this ground had been made in the court below. *Ibid.*

A provision in the will of the testatrix giving to two daughters named life estates in "the home place . . . , as long as they remain single," with a provision that on the marriage of either of them her life estate shall pass to her sister, followed by a clause making the same two daughters residuary devisees to whom "the home place" is devised subject to the life estates, is not against public policy as being in restraint of marriage. *Ruggles v. Jewett*, 167.

Where a statute of another State provides that "any marriage contracted by a person below the age of consent . . . may in the discretion of" a certain court of that State "be annulled at the suit of the party who at the time of contracting such marriage was below the age of consent," a marriage contracted in that State between parties, one of whom was below the age of consent, if it is not in violation of R. L. c. 151, §§ 1-5, is valid here until it has been annulled by a court of the State where it was solemnized, and the Superior Court of this Commonwealth has no jurisdiction of a petition for annulment of such a marriage. *Levy v. Downing*, 334.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASSACHUSETTS GENERAL HOSPITAL.

A direction in a will that a trust fund should be paid "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the Asylum of the Corporation," was held to create a trust for a charitable purpose. *Richards v. Church Home*, 502.

As to the same will it was held that the testatrix, by the words "Asylum of the Corporation," meant the McLean Asylum; that, since the trustee designated in the will could not act, it merely was necessary to appoint a new trustee; and that under the circumstances it was fitting that the Massachusetts General Hospital should act as such trustee. *Ibid.*

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*.

MECHANIC'S LIEN.

In a petition for the establishment of a mechanic's lien for lumber alleged to have been furnished under a contract and used for the construction of a

dwelling house, where a material question is, whether the lumber last delivered was used for the construction of a structure upon the land, the fact that a single issue, whether the lumber last delivered was furnished by the petitioner in good faith and under the contract, was submitted to a jury who answered it in the affirmative, does not preclude the respondent, at the hearing by a judge of an application for the establishment of the lien, from introducing evidence tending to show, nor the judge from finding upon conflicting evidence, that such lumber was not used for structures upon the land within the meaning of R. L. c. 197, § 1. *Curtis & Pope Lumber Co. v. Wolmer*, 456.

In such case, it also was held that a finding, that lumber furnished for the construction of enclosures for receptacles for garbage and ashes was not furnished for a structure upon the land within the meaning of R. L. c. 197, § 1, was warranted. *Ibid.*

Where, at the trial of an issue, submitted to a jury in a petition for the establishment of a mechanic's lien for work done and materials furnished in the construction of a building under a contract in writing, as to what sums were due to the petitioner after the giving to the respondent of such credits as he was entitled to, the respondent introduces evidence tending to show that there were omissions and defects in the performance of the contract of such a nature that they could not reasonably be remedied so as to make the work correspond exactly to the contract requirements, the petitioner is entitled to have the jury instructed that there should be deducted from the contract price the amount by which the value of the building as left by him fell short of what that value would have been if the contract had been exactly performed. *Pelatoski v. Black*, 428.

In such a case, the respondent may ask an expert witness what in his opinion would be the fair cost of remedying such conditions so that they would comply with the specifications, such evidence being competent upon the issue, whether there had been a substantial performance of the contract. *Pelatoski v. Black*, 428.

If on a petition to establish a mechanic's lien the jury finds, upon one of the issues submitted to them which is material to a determination of the validity of the lien, that a certain construction mortgage was not given by the owner of the premises to pay off a prior mortgage and *pro tanto* in substitution for it, the owner and both mortgagees being parties to the petition, such finding is *res judicata* barring an action subsequently brought by the administrator of the estate of the owner against the second mortgagee seeking damages for alleged fraud on his part in taking an assignment instead of a discharge of the prior mortgage and then foreclosing it. *Rochford v. Atkins*, 368.

A lien on real estate under R. L. c. 197 for labor and materials is not lost by mere delay in completing the contract if the contract was completed in good faith and without any conduct which could constitute an estoppel, although after the making of the contract and before its completion a mortgage of the property was made and foreclosed without any knowledge of the contract on the part of the mortgagee or of the purchaser at the foreclosure sale. *Shaughnessy v. Isenberg*, 159.

Application of the foregoing. *Ibid.*

MISTAKE.

Suit in equity for relief from, see EQUITY JURISDICTION, *Mistake*.

• MORTGAGE.

Of Personal Property.

A person in possession of chattels as the vendee under a contract of conditional sale has a special property in them which he can mortgage. *Keepers v. Fleitmann*, 210.

Where the owner of personal property successively executes mortgages of it to two different persons, and neither of the mortgages is recorded within the time fixed by R. L. c. 198, § 1, if either of the mortgagees obtains delivery of the property from the mortgagor and thereafter retains it, his mortgage is valid against the other mortgagee. *Ibid*.

Where the holder of an unrecorded mortgage of personal property takes possession of the property under a right given him by the mortgage, the property has been delivered to him within the meaning of R. L. c. 198, § 1. *Ibid*.

In an action for the alleged conversion of certain personal property, which had been mortgaged by the owner successively to the plaintiff and to the defendant by mortgages which were not recorded as required by R. L. c. 198, § 1, if it appears that, after the defendant lawfully had taken possession of the property under his mortgage and had put a paid agent in charge of it, the plaintiff induced such agent to agree to hold the mortgaged property for the plaintiff under the plaintiff's mortgage and that such agent did so, this does not show a delivery of the mortgaged property by the mortgagor to the plaintiff within the meaning of R. L. c. 198, § 1. *Ibid*.

In a suit in equity against an attorney at law an assignment of a life insurance policy by the plaintiff to the defendant was held to have been made, not as security for a loan, but absolutely. *Manheim v. Woods*, 537.

Of Real Estate.

An action by a mortgagor of real estate to recover a balance in the hands of the mortgagee after a foreclosure sale, where such balance was held by the mortgagee as the result of a contract with the mortgagor for the sale of the real estate, was held not to be barred by the statute of frauds because the sale had been performed and the promise to pay over the excess was separable from the rest of the contract. *Zwicker v. Gardner*, 95.

A lien on real estate under R. L. c. 197, for labor and materials is not lost by mere delay in completing the contract if the contract was completed in good faith and without any conduct which would constitute an estoppel, although after the making of the contract and before its completion a mortgage of the property was made and foreclosed without any knowledge of the contract on the part of the mortgagee or of the purchaser at the foreclosure sale. *Shaughnessy v. Isenberg*, 159.

In a suit in equity in which the plaintiff sought a reformation of a mortgage deed of real estate which, he alleged, by mutual mistake of his mother and

Mortgage (continued).

himself she had given to him instead of a deed conveying a title in fee simple, findings of a master were held to have been warranted by the evidence, and a decree for the plaintiff based thereon was affirmed. *Kennedy v. Poole*, 495.

The statute of frauds has no application to a suit in equity seeking the reformation of a deed of real estate by the striking out of a clause of defeasance inserted by a mutual mistake of the parties. *Ibid.*

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

One, who was appointed and has served and been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he had received. *Riopel v. Worcester*, 15.

Obligation of a city to pay its police officers is determined, limited and governed by statute, ordinance or contract. *Ibid.*

Violation by a street railway corporation of a town regulation as to speed, which was held to be evidence of negligence. *Donovan v. Connecticut Valley Street Railway*, 99.

Officers and Agents.

A competent draw tender employed to operate a draw by a town upon which the duty is imposed by statute to maintain the draw and employ such a draw tender, acts in the performance of his duties as a public officer and is not an agent of the town, and, if a traveller is injured by the negligence of such draw tender in operating the draw, his only remedy is against the draw tender personally. *Hawes v. Milton*, 446.

Acts of selectmen of a town in granting licenses to sell intoxicating liquors, and of the treasurer of the town in receiving the license fee and in paying a portion thereof into the town treasury, are acts of public officers and not of officers of the town. *Brown v. Nahant*, 271.

Such a licensee therefore cannot recover from the town the amount of a license fee on the ground that he paid it under a mistake of fact, because there was no transaction between the town and the licensee, and because a town cannot be held liable for the act of a public officer, although enjoying the advantage of it, unless a remedy is given by statute. *Ibid.*

One, who was appointed and has served and been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he had received. *Riopel v. Worcester*, 15.

What determines the obligation of a city to pay its police officers. *Ibid.*

In an action by a town under R. L. c. 81, § 9, for expenses alleged to have been incurred for the support of the defendant, a married woman, as a pauper, it was held that under the circumstances a previous determination by the board of overseers of the poor of the town to charge the defendant's husband for the supplies in question, must be taken as final. *Millis v. Frink*, 350.

Duty as to Streets.

A city taking land for the widening of a highway under statutory authority is not obliged to grade the way to the level of adjacent land or to construct approaches from such land. If the owner of such adjacent land is compelled to incur expense in order to provide access to the way from his land, such expense will be taken into account in assessing his damages for the taking. *Preston v. Newton*, 483.

Liability for Defects in Highways.

Liability of municipalities under R. L. c. 51, § 18, for defects in highways, see *WAY, Public, Defect*.

Business for Profit.

A municipality has the power to let for profit real estate held for public purposes and not needed for such purposes at the time of the letting. *Davis v. Rockport*, 279.

If a town, holding common land within its limits on a bluff facing the sea, which is not required at the time for any public purpose, lays out such land in house lots, which it leases to tenants for a substantial rental, this is not *ultra vires*, and the town is liable to one of its tenants, in the same way that a private owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants. *Ibid*.

Action against Pauper under R. L. c. 81, § 9.

In an action by a town under R. L. c. 81, § 9, for expenses alleged to have been incurred for the support of the defendant, a married woman, as a pauper, it was held that under the circumstances a previous determination by the board of overseers of the poor of the town, to charge the defendant's husband for the supplies in question, must be taken to be final. *Millis v. Frink*, 350.

NAME.

In an action against the members of a partnership upon a promissory note, if the note sued upon bears a signature which is not strictly accurate as the firm name but which has been used by the defendants in the partnership business and by which the partnership is known commercially as well as by its true name, the difference between the correct name of the firm and the signature on the note is immaterial. *Phipps v. Little*, 414.

NEGLIGENCE.

Due Care of Plaintiff.

Of one at work with a circular saw. *Lavartue v. Ely Lumber Co.* 65.

Of one employed as an oiler of machinery in continuing at his work after the machinery began to run in an unusual manner. *Rivers v. Richards*, 515.

Of a carpenter who, in obedience to his superintendent, got upon a wooden canopy attached to a building in order to assist in removing the canopy,

Negligence (continued).

- and misunderstood a warning from a fellow workman when the canopy began to fall. *McKinnon v. Pitman & Brown Co.* 284.
- Of one backing off from a freight elevator on a side which he knew was unguarded. *Amiot v. Foster*, 573.
- Of one who had been helping a teamster to unload bricks from a flat car in a freight yard and, while resting on the car between loads, was killed when the car was struck by another, shunted on to the same track without warning. *Griswold v. Boston & Maine Railroad*, 12.
- Of a boy driving along the rails of a street railway track when there was ice on the roadway. *Barbrick v. Boston Elevated Railway*, 370.
- Of one driving from one street upon street railway tracks on another street, after seeing a street car standing there. *Moriarty v. Connecticut Valley Street Railway*, 97.
- Of one driving from an intersecting street across a street railway track after looking and listening and not seeing or hearing any car approaching. *Wilkins v. Boston & Northern Street Railway*, 265.
- Of boy who, with his back toward a nearby street railway track, helped his sister to alight from a wagon and was struck by a passing street car. *Angelary v. Springfield Street Railway*, 110.
- Of a boy following others across a street railway track from behind a car which had stopped on a parallel track. *Lucarelli v. Boston Elevated Railway*, 454.
- Of a driver of a delivery wagon, who, having backed his horse and wagon across a street railway track and against the curb of the street, is unloading a barrel, when the team is struck by a car approaching at an excessive rate of speed. *Donovan v. Connecticut Valley Street Railway*, 99.
- Of a passenger in a street railway car, who has signalled for the car to be stopped and, before the speed of the car has been slackened, leaves his seat and walks to the door and stands inside the doorway. *Young v. Boston & Northern Street Railway*, 267.
- To attempt to board an electric street car while it is in motion is not negligence as a matter of law. *Hamilton v. Boston Elevated Railway*, 420.

Due Care of Plaintiff's Decedent.

- Of a child playing in highway. *Burns v. F. Knight & Son Corp.* 510.
- Of a rear end brakeman killed in a rear end collision which was caused in part by his neglect of duty. *Buchanan v. New York, New Haven, & Hartford Railroad*, 473.
- In an action against the proprietor of a cotton mill for causing the instant death of a back boy in its employ, who in some unexplained manner was struck and killed by the counterweight of an elevator, it was held that, because the conduct of the boy before and during the opening of certain trap doors was a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident, and consequently that the action could not be maintained. *Taylor v. Pierce Brothers*, 247.

Of Child.

- In an action for causing the death of a boy seven years and five months of age, where the jury were instructed that the boy was not in the exercise of due care in placing himself where he incurred the injury that caused his

- death "if he appreciated the danger that there was in putting himself in the place where he was," it was held that the instruction certainly was sufficiently favorable to the defendant. *Burns v. F. Knight & Son Corp.* 510.
- In the same case it was said, that one of the reasons that a child is not to be expected to exercise the same degree of care as an adult is his lack of appreciation of the risks he may be running. *Ibid.*
- It is not necessarily negligent for an ordinarily bright boy seven years and five months of age, who sees men with horses moving a heavy iron girder along the ground, to stand within the natural forward course of a roller on which the girder is laid. *Ibid.*
- At the trial of an action for causing the death of such a boy by allowing the roller to run over him, it is right for the presiding judge to refuse to make a ruling that if the boy so stood he was not in the exercise of due care, especially where it appears that the boy was in the centre of the sidewalk of a public street and that the roller was lying in the gutter below the level of the sidewalk before it suddenly was started into motion, and where it is not a conceded fact that the boy had seen the roller or was at fault in not having seen it. *Ibid.*
- Certain evidence, which tended to show either that a boy four years and ten months of age was "chased" out of a shop into a street where he was struck by an automobile, or that he and his companions in playing a game were running down a runway from the shop and he followed one of the other children into the street, was held not to be sufficient to show him to have been negligent as a matter of law. *Ayers v. Ratschesky*, 589.

Of Person in Charge of Child.

The mother of a boy of average brightness, four years and ten months of age, living in a house without a yard on a short and narrow street principally occupied by automobile repair shops, is not negligent as matter of law in allowing her boy to go into the street with only such attention as she is able to give him by going to the window at reasonable intervals while engaged in her household duties, especially at an hour when the shops are closing and the streets are practically cleared. *Ayers v. Ratschesky*, 589.

Assumption of Risk.

By employees, see *post*, *Employer's Liability*, Assumption of risk by employees.

In an action for personal injuries from being hit by the head of a hammer that came off the handle when the plaintiff, in accordance with a general instruction of his employer and at the request of an electrical engineer of the defendant, who was installing an engine in a power house of the plaintiff's employer, was assisting such engineer in tightening bolts by holding a wrench on one of the bolts while the engineer struck the handle of the wrench with a hammer in order to set the bolt more tightly, it was held that on the evidence it was a question for the jury whether in doing so the plaintiff assumed the risk of an injury from the head of the hammer coming off. *Sprague v. General Electric Co.* 375.

Invited Person.

One who, while helping a teamster to unload to a wagon bricks from a car in a railroad freight yard, rests on the car between wagon loads, may be found to be within the scope of his employment while so resting and to be in the yard by an implied invitation of the railroad corporation, which can be held responsible for his death resulting from its negligence or negligence of its employees. *Griswold v. Boston & Maine Railroad*, 12.

The owner of a horse and wagon, who has a contract with a railroad corporation to carry the mail between the railroad station and the post office in a town, in transporting in the wagon a railway mail clerk in the employ of the United States, whose duty it is to keep the mail in his custody until it is delivered at the post office, owes him at the most no greater duty in regard to the wagon than to exercise reasonable care to provide one that is safe. *Davis v. Crisham*, 151.

Trespasser.

Under St. 1909, c. 534, §§ 2, 9, if the owner of an automobile which is not registered in his name operates it upon a highway, he is there unlawfully, and a street railway company in operating its cars upon the highway owes him no other duty than to abstain from injuring him by wantonness or recklessness. *Love v. Worcester Consolidated Street Railway*, 137.

Employer's Liability.

Assumption of risk by employee.

Assumption of risk by employee at work with a circular saw. *Lavartue v. Ely Lumber Co.* 65.

By an experienced workman, clearing away debris after the blasting with dynamite of a rock, of the danger that some dynamite was left unexploded. *Hickey v. Worcester*, 125.

By an oiler in a grain elevator of the risk of a lever being shifted from below while he was standing upon it. *Glavin v. Boston & Maine Railroad*, 435.

By a mason's tender employed in the erection of a building which is not an iron or steel framed building within R. L. c. 104, § 44, of the risk of falling through a certain hole in the plank flooring. *Gainey v. Peabody*, 229.

Whether an oiler of machinery assumed the risk of an injury which he received, by continuing at work after the machinery began to run in an unusual manner, was held to be a question for the jury. *Rivers v. Richards*, 515.

An employee, who, having been told by one acting as a superintendent for his employer to go to work on a certain machine, objects to doing so because he does not know how to run it, but, under a threat of dismissal, goes to work at the machine, does not assume the risk of injury from defects in the machine which are not obvious and of which he does not know and is not warned. *Dagis v. Walworth Manuf. Co.* 524.

Ways, works, or machinery.

Evidence tending to show, that a workman, who was assisting in unloading lumber for his employer by means of a hoisting engine and derrick, was

crushed and killed by the falling of a load of the lumber by reason of the defective condition of the hoisting engine in consequence of which it did not hold up the load, will warrant a finding that the death was caused by a defect in the ways, works or machinery of the employer within the meaning of R. L. c. 106, § 71, cl. 1, § 73. *Laplant v. J. W. Bishop Co.* 148.

Superintendence.

In an action for personal injuries, sustained while the plaintiff was in the employ of the defendant and was cutting boards into strips with a circular saw and caused by strips into which a board was being cut coming against a pile of refuse so that the plaintiff's hand was thrown upon the saw, it was held that the questions, whether the plaintiff assumed the risk of the injury and whether he was in the exercise of due care, were for the jury, as was also the question whether the defendant's superintendent was negligent. *Lavartue v. Ely Lumber Co.* 65.

It was held that, under the circumstances, a foreman in charge of loading into carts broken stone from a stone crusher, could be found to have been a statutory superintendent in relation to teamsters, if, after having closed the slide of one hopper only partially when he should have closed it wholly, he directed a teamster to back his cart under the next hopper and some stone came down from the partly closed hopper on the back of the horse. *Bourdeau v. J. J. Prindiville Co.* 145.

In an action against an employer for the death of an employee alleged to have been caused by the negligence of a superintendent of the defendant, there was evidence that the death was caused by the falling of a load from a derrick due to its being improperly fastened through the negligence of one who "had full charge of the derrick, unloading, piling, signalling and one thing and another," and it was held that a finding was warranted that the death was caused by the negligence of a statutory superintendent of the defendant. *Laplant v. J. W. Bishop Co.* 148.

In an action by an employee against his employer for injuries caused by the falling of a wooden canopy attached to a building while the plaintiff was at work upon the canopy tearing it down, it was held that there was evidence tending to show that the plaintiff's injury was due to negligence of the superintendent. *McKinnon v. Pitman & Brown Co.* 284.

Action by a freight handler against a railroad corporation by which he was employed for personal injuries caused by the falling of a pile of large bales of sisal grass, in which it appeared that the plaintiff was very familiar with the method of piling up bales, and it was held that there was no negligence on the part of the superintendent in giving him an order to go up on the pile and pull in one of the bales, or in failing to warn him of the unfinished state of the pile and the consequent danger of climbing upon it. *Cusick v. New York, New Haven, & Hartford Railroad*, 306.

Signal, switch, locomotive engine or train.

In an action by the administrator of the estate of a rear end brakeman of a passenger train against the railroad corporation by which he was employed, for causing his death in a collision, it was held that the plaintiff could not recover, because a failure of duty by the intestate in the giving of signals contributed to the happening of the accident, and the fact that the negli-

Negligence (continued).

gence of the engineer coöperated to cause the accident did not excuse the negligence of the intestate or change its effect. *Buchanan v. New York, New Haven, & Hartford Railroad*, 473.

Dangerous or defective machinery or appliances.

An employee who, having been told by one acting as a superintendent for his employer to go to work on a certain machine, objects to doing so because he does not know how to run it, but, under a threat of dismissal, goes to work at the machine, does not assume the risk of injury from defects which are not obvious and of which he has not been warned. *Dagis v. Walworth Manuf. Co.* 524.

If oiling or cleaning a certain machine is necessarily incident to its operation and an employee is set at work upon the machine without any instruction as to the method of running it and is injured by reason of its automatically starting while he is oiling it, the employer cannot escape liability for the injury on the ground that the employee was not directed to oil the machine by him or by any one acting in his behalf. *Ibid.*

If an employee is put at work upon a machine without his employer or any one with authority from the employer giving him any warning as to the nature of the machine or any instruction as to the way to run it, and is injured by reason of a defective or dangerous condition of the machine and of the method he is using while he is engaged in performing his work in a manner in which he had been told to do it by his fellow employees, the employer cannot escape liability on the ground that, in doing the work in the manner which caused his injury, the employee was acting without authority from him. *Ibid.*

In an action, by one employed as an oiler of machinery which was used as a part of a complicated device for transferring coal from a coal tower to cars running upon a cable railway, against his employer for personal injuries, it was held that an unusual movement of the machinery, which caused the injury, if unexplained, was in itself evidence of a want of repair which might be due to negligence of the person who was in responsible control of the machinery. *Rivers v. Richards*, 515.

In such case, it was held that the questions, whether in continuing working as instructed after noticing the change in the movements of the machinery, the plaintiff was in the exercise of due care, and whether under the circumstances he assumed the risk of the injury, were for the jury. *Ibid.*

It also was held in such case that, because the defendant owed the plaintiff no duty to change the character of the machinery that was in use when the plaintiff's employment began, an expert witness should not have been permitted to testify that the unusual movement of the machinery might have been avoided by the adoption of a certain device. *Ibid.*

At the trial of an action at common law against a street railway company by an employee who was injured in a car barn by being run into by a shifting table which started unexpectedly as he was passing in front of it in the course of his duties, it was held that a verdict properly was ordered for the defendant because the evidence left it a matter of conjecture whether the table started automatically because of a defect in it or whether the starting was due to negligence of the fellow servant. *Ridge v. Boston Elevated Railway*, 460.

And it therefore was held that the exclusion of evidence, offered by the plaintiff to show what might cause the table to start automatically, and also of evidence offered to show that a fellow servant before the accident had said that there was a defect in the table, is immaterial. *Ridge v. Boston Elevated Railway*, 460.

It is not necessary for a presiding judge to state to the jury the established rule, that the unexplained automatic starting of a machine when it ought to be at rest is evidence of a defect or want of repair, where evidence relating to a simple device that has been brought into the court room and inspected affords an explanation of the starting of the machine, and definite causes of starting have been discussed before the jury and the judge in his charge assumes that the plaintiff relies on such a definite cause and the plaintiff does not except to this assumption. *Cook v. Newhall*, 392.

In an action by a workman in a wire mill against his employer, where it appeared that the plaintiff was a green hand twenty-one years of age and had been injured by having his hand drawn into gears when he was using a handful of waste in wiping some oil off the bed of gears only six and five eighths inches below them while the machine was in motion, it was held, that there was no occasion for the defendant to warn the plaintiff against the danger of cleaning the machine while in motion, and therefore that the defendant's failure to do so was not evidence of negligence. *Ojala v. American Steel & Wire Co.* 116.

At the trial of an action by an employee against his employer for personal injuries received in a fall from a wooden horse, it appeared that the plaintiff's shoe caught upon a projecting nail and he was thrown to the floor, that the horse was not the property of the defendant, and that there was no evidence to explain the presence of the nail, and it was held that there was no evidence which would warrant a finding of negligence on the part of the defendant. *Blake v. John F. Johnston Co.* 143.

Permitting a workman in the employ of a city, who is assisting in clearing away debris caused by the blasting of a rock with dynamite in excavating for a sewer, to work until twenty minutes after four on the afternoon of the eighth of December, even if the workman has only one eye, is not in itself evidence of negligence toward the workman on the part of the superintendent in charge of the work. *Hickey v. Worcester*, 125.

In an action against a city under the employers' liability act for causing the death of a workman, who was assisting in the blasting of a rock with dynamite in excavating for a sewer and who was killed while clearing away the debris after a blast by an explosion of one piece of dynamite that had been left unexploded, it was held that the accident was caused by a danger incident to the work which the workman was employed to perform. *Ibid.*

In the same case it was held that the evidence failed to show negligence on the part of the defendant in not supplying a suitable exploder for the dynamite. *Ibid.*

Circumstances which were held to preclude recovery by one who, while employed as an oiler in a grain elevator, with the duty to oil the bearings of the shafting while the machinery is in operation, was injured by reason of a lever on which he had rested one foot being shifted from below in obedience to an order of a superintendent. *Glavin v. Boston & Maine Railroad*, 435.

*Negligence (continued).***Dangerous place in which to work.**

Assumption, by a mason's tender employed in the erection of a building which is not an iron or steel framed building within R. L. c. 104, § 44, of the risk of falling through a certain hole in the plank flooring. *Gainey v. Peabody*, 229.

In an action against the proprietor of a cotton mill for causing the instant death of a back boy in its employ, who in some unexplained manner was struck and killed by the counterweight of an elevator, it was held that, because the conduct of the boy before and during the opening of certain trap doors was a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident, and consequently that the action could not be maintained. *Taylor v. Pierce Brothers*, 247.

Action by a workman in a quarry against his employer to recover for injuries caused by the plaintiff being struck by a stone which was thrown by a blast from a pit adjoining that in which the plaintiff was working against the side of the pit and rebounded, in which it was held that on the evidence the jury would not have been warranted in finding the defendant liable. *Hildonen v. Rockport Granite Co.* 287.

In an action for the conscious suffering and death of one employed in a saw-mill, the plaintiff offered to prove merely that the employee was last seen going alone into a dark room in the basement of the mill, where his body afterwards was found under circumstances which showed that his clothing had been caught on some shafting, and it was held that there was no evidence offered tending to show that the deceased went into the room in the course of his employment, so that his employer owed him no duty to warn him in regard to the conditions there. *Francis v. Rounseville*, 332.

Fellow servant.

In an action for personal injuries from being hit by the head of a hammer that came off the handle when the plaintiff, in accordance with a general instruction of his employer and at the request of an electrical engineer of the defendant, who was installing an engine in a power house of the plaintiff's employer, was assisting such engineer, it was held that the question, whether the plaintiff when so assisting became a servant of the defendant so that his injury was caused by the act of a fellow servant, was for the jury. *Sprague v. General Electric Co.* 375.

Identity of employer.

In a certain action under the employers' liability act against a corporation for causing the death of one of its workmen, it was held to be no defense that, after the employment of such workman and before the accident which caused his death, the defendant had transferred to another corporation the business in which such workman was employed, if the deceased workman had no knowledge of a change in his employer and was not put upon inquiry in regard to such change. *Beauregard v. Benjamin F. Smith Co.* 259.

In proving that the defendant was the employer in such a case, the plaintiff may be allowed to show by the oral testimony of the officer who made service of the notice required by the statute, that he served the notice upon the defendant in a certain office, near the door of which was a sign bearing the defendant's name, this being material to show that the defend-

ant still was doing business at the time that the workman was killed, and being a matter apart from the officer's official return of service of the notice. *Beauregard v. Benjamin F. Smith Co.* 259.

Street Railway.

Persons on highway.

Action against a street railway company by the driver of a delivery wagon who, having backed his horse and wagon across the defendants' track and against the curb of the street, is unloading a barrel, when the team is struck by a car approaching at an excessive rate of speed in violation of a town regulation, where the questions of the plaintiff's due care and of the negligence of the defendant were held to be for the jury. *Donovan v. Connecticut Valley Street Railway*, 99.

In an action against a street railway company for personal injuries, sustained by a boy less than twelve years of age, who was struck by a car of the defendant, while, with his back toward the defendant's track, he was helping his sister to alight from a wagon, it was held that the question of the plaintiff's due care was for the jury. *Angelary v. Springfield Street Railway*, 110.

In an action against a street railway company by a boy seventeen years of age for personal injuries caused by the plaintiff being thrown from a team by a collision with a street car on a very dark and foggy evening, when, on account of ice and snow in the roadway, the plaintiff was driving on the rails of the right hand track, it was held that the evidence warranted a submission to the jury of the questions, whether the plaintiff was in the exercise of due care and whether the servants of the agent were negligent. *Barbrick v. Boston Elevated Railway*, 370.

Action against a street railway company for injuries sustained by reason of a horse and wagon driven by the plaintiff being run into by a car of the defendant at the intersection of two streets, when there was evidence tending to show that the plaintiff started across the defendant's track when the car was at a standstill, and that the motorman started the car without looking to the right or the left for approaching travellers, and it was held that there was evidence for the jury of due care of the plaintiff and of negligence of the defendant's servants. *Moriarty v. Connecticut Valley Street Railway*, 97.

Where, at the trial of an action against a street railway company for injuries to a boy ten years of age who was run into by a car of the defendant, there is evidence tending to prove that the boy, as he was following others upon a cross walk back of a car of the defendant that had stopped there, to cross the street over a parallel track of the defendant, was struck on such other track by a car whose gong he had not heard sounded and whose approach he had not heard, the questions, whether the boy was in the exercise of due care and whether the defendant was negligent, are for the jury. *Luca-relli v. Boston Elevated Railway*, 454.

Where, at such trial the only testimony on the question of whether the gong on the second car was rung is the testimony of the plaintiff, who states that he did not hear the approach of the second car nor hear its gong sounded, and the testimony of a witness for the defendant who was beside the motorman in the front vestibule of the second car and who stated that "the

Negligence (continued).

motorman had been ringing the gong," the jury are warranted in finding that the gong was not sounded. *Lucarelli v. Boston Elevated Railway*, 454. Under St. 1909, c. 534, §§ 2, 9, if the owner of an automobile which is not registered in his name operates it upon a highway, he is there unlawfully, and a street railway company in operating its cars upon the highway owes him no other duty than to abstain from injuring him by wantonness or recklessness. *Love v. Worcester Consolidated Street Railway*, 137.

Persons boarding car.

To attempt to board an electric street car while it is in motion is not negligence as a matter of law. *Hamilton v. Boston Elevated Railway*, 420.

If an electric street car is stopped to receive passengers, it is the duty of the conductor, before giving a signal to start the car, to ascertain, if he can do so by the exercise of due care, caution and diligence, that all who desire to board the car have had an opportunity to do so and that no person is attempting to get on the car under such circumstances as would make it dangerous to signal for the starting of the car. *Ibid.*

If the conductor of a crowded electric street car, after his car has stopped to take on passengers, gives the signal to start the car when he is inside the forward part of it, without making any effort to ascertain what or how many passengers are attempting to get upon the car and whether they actually have got upon it, thereby throwing to the ground a woman passenger who is in the act of boarding the car, in an action by such passenger for her injuries thus caused these facts are evidence of the conductor's negligence. *Pickford v. Boston Elevated Railway*, 507.

The facts that, in such case, the conductor called out to the passengers on the rear platform, "Is it all right?" and received the reply, "All right, go ahead," and that relying on this assurance he gave the signal to start the car, does not, if believed, show as matter of law that the conductor was in the exercise of due care, it being a question for the jury whether under the circumstances shown the conductor was justified in relying on such assurance. *Ibid.*

Passengers.

A street railway company is liable for an injury to a passenger on one of its cars caused by its failure to take reasonable precautions to guard the passengers from the rushing of a waiting crowd to board the car at a time and place when such action of the crowd ought to have been anticipated. *Morse v. Newton Street Railway*, 595.

In an action against a street railway company for personal injuries alleged to have been so caused, it was held that it was a question for the jury whether the defendant did all that it ought to have done to guard its passengers in the light of its knowledge of the crowds likely to be travelling on the evening when the plaintiff was hurt and their probable impatience and disorder, and considering the length of time during which it might have been found that people had been rushing upon the cars. *Ibid.*

One, who when travelling as a passenger in a street railway car was injured by reason of the sudden stopping of the car by the motorman in order to avoid a collision with an ice wagon that had come without warning in front of the car, or by reason of a sudden stopping of the car together with an

unexplained collision, has upon these facts alone no right of action against the railway company operating the car, there being nothing to indicate its negligence. *Niland v. Boston Elevated Railway*, 522.

For a street railway car, which has been running at an excessive rate of speed, to pass with undiminished speed over a switch and in doing so to give a sudden lurch, "like being snapped on the end of a whip," throwing a passenger, who is standing inside the doorway with a firm grasp on one side of it, against the controller box and completely down on the vestibule floor, and throwing another standing passenger across and upon a seat so that he grasps the window sill to save himself from falling, is evidence of negligence in the operation of the car. *Young v. Boston & Northern Street Railway*, 267.

Ruling by a judge in an action against a street railway company by a passenger for personal injuries received in an accident caused by the giving way of a culvert maintained by a town under a highway upon which the defendant's railway was constructed, which was interpreted to mean that the defendant was bound to discharge the obligations of a common carrier in regard to the foundations of its tracks, and that it did not discharge such obligations by relying upon the town and its officers to do their duty as to the culvert, and, so interpreted, was held to be correct. *Savin v. Connecticut Valley Street Railway*, 103.

Persons leaving car.

Evidence at the trial of an action by a woman against a street railway company for personal injuries alleged to have been caused by her being thrown from a car of the defendant when she was in the rear vestibule of the car and was about to alight, which was held to warrant a verdict for the plaintiff. *James v. Boston Elevated Railway*, 424.

Railroad.

Action against a railroad corporation for the death of one, who had been helping a teamster to unload bricks from a flat car in a freight yard and, while resting on the car between loads, was killed when the car was struck by another, shunted on to the same track without warning. *Griswold v. Boston & Maine Railroad*, 12.

In an action by the administrator of the estate of a rear brakeman of a passenger train against the railroad corporation by which he was employed, for causing his death in a collision, it was held that the plaintiff could not recover, because a failure of duty by the intestate in the giving of signals contributed to the happening of the accident, and the fact that the negligence of the engineer coöperated to cause the accident did not excuse the negligence of the intestate or change its effect. *Buchanan v. New York, New Haven, & Hartford Railroad*, 473.

In Use of Highway.

In an action against a corporation engaged in a general teaming business for causing the death of the plaintiff's intestate, a boy seven years and five months of age, through the negligence of a driver of a dray of the defendant, where it appears that the accident happened after half past six o'clock in

Negligence (*continued*).

the evening, it is proper for the judge in his charge to suggest to the jury that they may consider whether it was the time of night when the driver was in a hurry to finish his work and to get home and feed his horses, although there has been no direct evidence that the driver was in a hurry. *Burns v. F. Knight & Son Corp.* 510.

Question whether the child in such case was in the exercise of due care was held properly to have been submitted to the jury. *Ibid.*

The rule of law that a traveller on a highway approaching a crossing of a steam railroad necessarily must look and listen in order to be in the exercise of due care does not apply to a traveller about to cross a single track of a street railway on a street of a town. *Wilkins v. Boston & Northern Street Railway*, 265.

In driving from one street of a town into another at a right angle with it, where it is necessary to cross a single track of a street railway to pass into the second street, if at or near the corner which the driver is turning there is a tree which obstructs his vision, he is not necessarily wanting in due care in not stopping and looking again after passing the tree to see whether a street car is approaching on the track, if he listened and looked reasonably before reaching the tree. *Ibid.*

In an action against a street railway company for injuries caused by the collision of an electric car of the defendant with a wagon in which the plaintiff was driving, when he was turning from one street of a town into another and in order to do so was obliged to cross a single track of the defendant laid at the side of the street into which he was turning, it was held that on the evidence the question whether the plaintiff was in the exercise of due care was for the jury. *Ibid.*

Ruling by a judge in an action against a street railway company by a passenger for personal injuries received in an accident caused by the giving away of a culvert maintained by a town under a highway upon which the defendant's railway was constructed, which was interpreted to mean that the defendant was bound to discharge the obligations of a common carrier in regard to the foundations of its tracks, and that it did not discharge such obligations by relying upon the town and its officers to do their duty as to the culvert, and, so interpreted, was held to be correct. *Sawin v. Connecticut Valley Street Railway*, 103.

In an action against a street railway company for personal injuries sustained by a boy less than twelve years of age, who was struck by a car of the defendant while, with his back toward the defendant's track, he was helping his sister to alight from a wagon, it was held that the question of the plaintiff's due care was for the jury. *Angelary v. Springfield Street Railway*, 110.

Action against a street railway company by the driver of a delivery wagon who, having backed his horse and wagon across the defendant's track and against the curb of the street, is unloading a barrel, when the team is struck by a car approaching at an excessive rate of speed in violation of a town regulation, where the questions of the plaintiff's due care and the negligence of the defendant were held to be for the jury. *Donovan v. Connecticut Valley Street Railway*, 99.

Action against a street railway company for injuries sustained by reason of a horse and wagon driven by the plaintiff being run into by a car of the defendant at the junction of two streets, where there was evidence tend-

ing to show that the plaintiff started across the defendant's tracks when the car was at a standstill, and that the motorman started the car without looking to the right or the left for approaching travellers, and it was held that there was evidence for the jury of due care of the plaintiff and of negligence of the defendant's servants. *Moriarty v. Connecticut Valley Street Railway*, 97.

In an action against a street railway company by a boy seventeen years of age for personal injuries caused by the plaintiff being thrown from a team by a collision with a street car on a very dark and foggy evening, when, on account of ice and snow in the roadway, the plaintiff was driving on the rails of the right hand track, it was held that the evidence warranted a submission to the jury of the questions, whether the plaintiff was in the exercise of due care and whether the servants of the defendant were negligent. *Barbrick v. Boston Elevated Railway*, 370.

Under St. 1909, c. 534, §§ 2, 9, if the owner of an automobile which is not registered in his name operates it upon a highway, he is there unlawfully, and a street railway company in operating its cars upon the highway owes him no other duty than to abstain from injuring him by wantonness or recklessness. *Love v. Worcester Consolidated Street Railway*, 137.

In an action against a city for personal injuries sustained when the plaintiff was driving an automobile on a highway of the defendant by reason of an alleged defect in such highway, if it appears that the plaintiff at the time of the accident had no license to operate an automobile as then required by St. 1903, c. 473, §§ 4, 5, amended by St. 1905, c. 311, § 4, this fact, although it is evidence of the plaintiff's negligence, does not necessarily preclude his recovery. *Holland v. Boston*, 560.

One, who at dusk drove an automobile at the rate of eighteen miles an hour without sounding a horn into a narrow and obstructed street where children were playing and ran into one of them, can be found to have been negligent. *Ayers v. Ratshesky*, 589.

Certain evidence, which tended to show either that a boy four years and ten months of age was "chased" out of a shop into a street where he was struck by an automobile, or that he and his companions in playing a game were running down a runway from the shop and he followed one of the other children into the street, was held not to be sufficient to show him to have been negligent as a matter of law. *Ibid*.

In an action for personal injuries sustained, when the plaintiff had alighted from the right hand side of an open electric street railway car, from being struck by an automobile driven by the defendant, it was held that the facts, that the street railway car, before it came to a stop, had been proceeding in the same direction in which the defendant was travelling and that the defendant attempted to pass to the right of it, constituted a violation by the defendant of R. L. c. 54, § 2, and were evidence of negligence on his part. *Foster v. Curtis*, 79.

In an action by a woman against a town for personal injuries alleged to have been caused, as she, an experienced driver, was driving a team on the way in question and was turning into an intersecting street, by her running into two depressions with a mound between them, it was held that the questions, whether the plaintiff was in the exercise of due care or whether the accident was caused by the defect in the way, were for the jury. *Williams v. Winthrop*, 581.

At Street Railway Crossing.

The rule of law, that a traveller on a highway approaching a crossing of a steam railroad necessarily must look and listen in order to be in the exercise of due care, does not apply to a traveller about to cross a single track of a street railway on a street of a town. *Wilkins v. Boston & Northern Street Railway*, 265.

In driving from one street of a town into another at a right angle with it, where it is necessary to cross a single track of a street railway to pass into the second street, if at or near the corner which the driver is turning there is a tree which obstructs his vision, he is not necessarily wanting in due care in not stopping and looking again after passing the tree to see whether a street car is approaching on the track, if he listened and looked reasonably before reaching the tree. *Ibid*.

In Use of Automobile.

Driving an automobile without an operator's license was held to be evidence of negligence. *Holland v. Boston*, 560.

Use of an unregistered automobile which was held to be an unlawful use of the highway. *Loe v. Worcester Consolidated Street Railway*, 137.

One, who at dusk without sounding a horn drove an automobile at the rate of eighteen miles an hour into a narrow and obstructed street where children were playing and ran into one of them, can be found to have been negligent. *Ayers v. Ratskesky*, 589.

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In Use of Wagon.

The facts, that the irons which held in place the seat of an open wagon broke when the horse attached to the wagon started suddenly and that a person sitting on the seat fell backward into the body of the wagon, are not evidence of negligence on the part of the owner of the horse and wagon in failing to provide a safe wagon for the transportation of the person on the seat. *Davis v. Crisham*, 151.

In Subway.

Action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, in which it was held that there was no evidence that the defendant was responsible for the adoption or use of the escalator in question, since it was adopted and installed by the Boston Transit Commission. *Theall v. Boston Elevated Railway*, 327.

In Use of Elevator.

One who is in control of an elevator is not liable to a person who, while not in the exercise of due care, is injured by a fall from the elevator by reason of a failure to equip it with the safety-guards required by R. L. c. 104, § 43. *Amiot v. Foster*, 573.

In Use of Escalator.

Action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, in which it was held that there was no evidence that the defendant was responsible for the adoption or use of the escalator in question, since it was adopted and installed by the Boston Transit Commission. *Theall v. Boston Elevated Railway*, 327.

In Use of Explosives.

In an action against a city under the employers' liability act for causing the death of a workman, who was assisting in the blasting of a rock with dynamite in excavating for a sewer and who was killed while clearing away the debris after a blast by an explosion of one piece of dynamite that had been left unexploded, it was held that the accident was caused by a danger incident to the work which the workman was employed to perform. *Hickey v. Worcester*, 125.

In the same case it was held that the evidence failed to show negligence on the part of the defendant in not supplying a suitable exploder for the dynamite. *Ibid*.

Action by a workman in a quarry against his employer to recover for injuries caused by the plaintiff being struck by a stone which was thrown by a blast from a pit adjoining that in which the plaintiff was working against the side of the pit and rebounded, in which it was held that on the evidence the jury would not have been warranted in finding the defendant liable. *Hildonen v. Rockport Granite Co.* 287.

Of One Controlling Real Estate.

If in an action against the owner of a tenement house for personal injuries alleged to have been received by one of the family of a tenant because of a defective condition of a ceiling of a passageway used in common by all the tenants, it appears that previous to the injury the defendant had given to another person a lease of the premises which was in force at the time of the injury, and there is no evidence that such lessee had not taken possession of the premises or was not in control of them, it is immaterial what was the defendant's motive in making the lease, and a verdict properly may be ordered for the defendant. *Green v. Pearlstein*, 360.

Action against one in control of a building by an employee of a tenant therein who was injured by reason of his backing off from an unguarded side of a freight elevator. *Amiot v. Foster*, 573.

In Mill.

In an action for the conscious suffering and death of one employed in a saw mill, the plaintiff offered to prove merely that the employee was last seen

Negligence (*continued*).

going into a dark room in the basement of a mill where his body was found under circumstances which showed that his clothing had been caught on some shafting, and it was held that there was no evidence offered tending to show that the deceased went into the room in the course of his employment, so that his employer owed him no duty to warn him in regard to the conditions there. *Francis v. Rounseville*, 332.

In an action against the proprietor of a cotton mill for causing the instant death of a back boy in its employ, who in some unexplained manner was struck and killed by the counterweight of an elevator, it was held that, because the conduct of the boy before and during the opening of certain trap doors was a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident, and consequently that the action could not be maintained. *Taylor v. Pierce Brothers*, 247.

In Freight House.

Action by a freight handler against a railroad corporation by which he was employed for personal injuries caused by the falling of a pile of large bales of sisal grass, in which it appeared that the plaintiff was very familiar with the method of piling up bales, and it was held that there was no negligence on the part of the superintendent in giving him an order to go up on the pile and to pull in one of the bales, or in failing to warn him of the unfinished state of the pile and the consequent danger of climbing upon it. *Cusick v. New York, New Haven, & Hartford Railroad*, 306.

In Care of Floor of Market.

The presence upon the floor of a market, which was sprinkled with sawdust twice a day, of a piece of meat covered with sawdust upon which a woman customer slipped and was injured, is not evidence of negligence on the part of the proprietor of the market, if it does not appear how long the piece of meat had been on the floor or how it got there or how it became covered with sawdust. *Norton v. Hudner*, 257.

In Maintenance of Private Way by a Municipality for Profit.

If a town, holding common land within its limits on a bluff facing the sea, which is not required at the time for any public purpose, lays out such land in house lots, which it leases to tenants for a substantial rental, this is not *ultra vires*, and the town is liable to one of its tenants, in the same way that a private owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants. *Davis v. Rockport*, 279.

In Construction Work and Building Operations.

In an action for personal injuries from being hit by the head of a hammer that came off the handle when the plaintiff, in accordance with a general instruction of his employer and at the request of an electrical engineer of the defendant, who was installing an engine in a power house of the plaintiff's employer, was assisting such engineer in tightening bolts by holding a wrench on one of the bolts while the engineer struck the handle of the

wrench with the hammer in order to set the bolt more tightly, it was held that on the evidence it was a question for the jury, whether the plaintiff was negligent in thus assisting in tightening the bolt, or whether in doing so he assumed the risk of an injury from the head of the hammer coming off. *Sprague v. General Electric Co.* 375.

And in the same action it was held that the question, whether the plaintiff when assisting in tightening the bolt became a servant of the defendant so that his injury was caused by the act of a fellow servant, was one to be submitted to the jury with proper instructions. *Ibid.*

And also that, under the circumstances shown, the authority of the defendant's servant to ask the plaintiff for temporary assistance fairly could be presumed, and that, in rendering such assistance for the purpose of facilitating the work of his employer, the plaintiff did not cease to be the servant of such employer or lose his right to be protected from the carelessness of the defendant's servants. *Ibid.*

In such action it also was held that the questions, whether the hammer was defective, and whether in the exercise of due care the defendant's servant should have discovered the defect, were for the jury, and that, if the defendant's servant was negligent in using the hammer, the defendant was liable for the injury caused by such negligence whether the hammer was furnished by the servant himself or by the defendant. *Ibid.*

Expert testimony which was held to have been admissible within the judge's discretion in such an action. *Ibid.*

Assumption, by a mason's tender employed in the erection of a building which is not an iron or steel framed building within R. L. c. 104, § 44, of the risk of falling through a certain hole in the plank flooring. *Gainey v. Peabody*, 229.

In Tearing down Buildings.

In an action by an employee against his employer for injuries caused by the falling of a wooden canopy attached to a building while the plaintiff was at work upon the canopy tearing it down, it was held that there was evidence of due care of the plaintiff and of negligence of the defendant's superintendent. *McKinnon v. Pitman & Brown Co.* 284.

Mail Clerk.

The owner of a horse and wagon, who has a contract with a railroad corporation to carry mail between the railroad station and the post-office in a town, in transporting in the wagon a railway mail clerk in the employ of the United States, whose duty it is to keep the mail in his custody until it is delivered at the post office, owes him at the most no greater duty in regard to the wagon than to exercise reasonable care to provide one that is safe. *Davis v. Crisham*, 151.

Barring Suit in Equity.

See EQUITY JURISDICTION, *Negligence barring suit.*

Causing Death.

Action against a railroad corporation for the death of one, who had been helping a teamster to unload bricks from a flat car in a freight yard and, while resting on the car between loads, was killed when the car was struck

Negligence (*continued*).

by another, shunted on to the same track without warning. *Griswold v. Boston & Maine Railroad*, 12.

Evidence tending to show that a workman, who was assisting in unloading lumber for his employer by means of a hoisting engine and derrick, was crushed and killed by the falling of a load of the lumber by reason of the defective condition of the hoisting engine in consequence of which it did not hold up the load, will warrant a finding that the death was caused by a defect in the ways, works or machinery of the employer within the meaning of R. L. c. 106, § 71, cl. 1, § 73. *Laplant v. J. W. Bishop Co.* 148.

In the same action it was held that there was evidence of negligence of a superintendent of the defendant. *Ibid.*

In an action for the conscious suffering and death of one employed in a saw mill, the plaintiff offered to prove merely that the employee was last seen going alone into a dark room in the basement of the mill, where his body afterwards was found under circumstances which showed that his clothing had been caught on some shafting, and it was held that there was no evidence offered tending to show that the deceased went into the room in the course of his employment, so that his employer owed him no duty to warn him in regard to the conditions there. *Francis v. Rounseville*, 332.

In an action against a city under the employers' liability act for causing the death of a workman, who was assisting in the blasting of a rock with dynamite in excavating for a sewer and who was killed while clearing away the debris after a blast by an explosion of one piece of dynamite that had been left unexploded, it was held that the accident was caused by a danger incident to the work which the workman was employed to perform. *Hickey v. Worcester*, 125.

In the same case it was held that the evidence failed to show negligence on the part of the defendant in not supplying a suitable exploder for the dynamite. *Ibid.*

Res ipsa loquitur.

The facts, that the irons which held in place the seat of an open wagon broke when the horse attached to the wagon started suddenly and that a person sitting on the seat fell backward into the body of the wagon, are not evidence of negligence on the part of the owner of the horse and wagon in failing to provide a safe wagon for the transportation of the person on the seat. *Davis v. Crisham*, 151.

It is not necessary for a presiding judge to state to the jury the established rule, that the unexplained automatic starting of a machine when it ought to be at rest is evidence of a defect or want of repair, where evidence relating to a simple device that has been brought into the court room and inspected affords an explanation of the starting of the machine, where definite causes of starting have been discussed before the jury and where the judge in his charge assumes that the plaintiff relies on such a definite cause and the plaintiff does not except to this assumption. *Cook v. Newhall*, 392.

In an action, by one employed as an oiler of machinery which was used as a part of a complicated device for transferring coal from a coal tower to cars running upon a cable railway, against his employer for personal injuries, it was held that an unusual movement of the machinery, which caused the plaintiff's injury, if unexplained, was in itself evidence of a want of

repair which might be due to the negligence of the person who was in responsible control of the machinery. *Rivers v. Richards*, 515.

In an action against the proprietor of a market for personal injuries caused by slipping on a piece of meat on the floor of the market, it was held that the mere presence of the meat on the floor was not evidence of negligence. *Norton v. Hudner*, 257.

Sudden stopping of a street railway car by the motorman, or an unexplained collision of the car with another vehicle, was held, in an action by a passenger on the car against the street railway company for personal injuries so caused, not in itself to be evidence of negligence on the part of the defendant. *Niland v. Boston Elevated Railway*, 522.

Matters of Conjecture.

Cases where the question of the defendant's negligence was left on the evidence a matter of conjecture, see EVIDENCE, *Matters of Conjecture*.

Evidence of Negligence on Other Occasions.

In an action against a corporation operating a street railway for causing the death of the plaintiff's intestate, it is proper to exclude on the issue of damages a question, "What have you noticed as to cars going along that particular stretch?" *Mahoney v. Boston Elevated Railway*, 196.

Violation of Town Regulation.

The violation by a street railway company of a regulation, established by the selectmen of a town and approved by the board of railroad commissioners, concerning the speed of cars upon street railways in the town, is evidence of negligence in an action against the street railway company for personal injuries alleged to have been caused by a car of the defendant when running at an excessive rate of speed. *Donovan v. Connecticut Valley Street Railway*, 99.

Violation of Statute.

One who is in control of an elevator is not liable to a person who, while not in the exercise of due care, is injured by a fall from the elevator caused by a failure to equip it with the safety guards required by R. L. c. 104, § 43. *Amiot v. Foster*, 573.

In an action for personal injuries sustained, when the plaintiff had alighted from the right hand side of an open electric street railway car, from being struck by an automobile driven by the defendant, it was held that the facts, that the street railway car, before it came to a stop, had been proceeding in the same direction in which the defendant was travelling and that the defendant attempted to pass to the right of it, constituted a violation by the defendant of R. L. c. 54, § 2, and were evidence of negligence on his part. *Foster v. Curtis*, 79.

In an action against a city for personal injuries sustained, when the plaintiff was driving an automobile on a highway of the defendant, by reason of an alleged defect in the highway, the fact that the plaintiff had no license to operate an automobile as then required by St. 1903, c. 473, §§ 4, 5; St. 1905, c. 311, § 4, is evidence of negligence of the plaintiff, but does not necessarily preclude his recovery. *Holland v. Boston*, 560.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

A waiver by the indorser of a promissory note of demand upon the maker is not a waiver of notice of the maker's default. *Hall v. Crane*, 326.

What is sufficient notice under St. 1908, c. 305, of injuries resulting from snow or ice. *Sullivan v. Wilson*, 342.

Evidence which was held not to tend to prove notice to a town of a defect in a highway. *Williams v. Winthrop*, 581.

In a suit in equity in which the plaintiff contended that conveyances to the defendant by the plaintiff's husband were in fraud of her marital rights, and it appeared that there were valid considerations for the conveyances, the plaintiff must show that the defendant knew or had notice of the plaintiff's rights when he received the conveyances. *Allen v. Allen*, 29.

NUISANCE.

What is a sufficient notice under St. 1908, c. 305, of injuries resulting from snow or ice. *Sullivan v. Wilson*, 342.

Although the plaintiff in an action for damages resulting from a nuisance cannot recover for damages which he could have avoided by the exercise of reasonable precautions, he is not required to take unreasonable steps or to commit a wrongful act or trespass upon the property of another in order to avoid damage. *Fairfield v. Salem*, 296.

Application of the foregoing principle in an action by the owner of a wharf against a city for damages resulting from a discharge of sewage by the defendant into the dock adjoining the wharf, where there was evidence tending to show that the plaintiff had attempted to get permission from the harbor and land commissioners to dredge the dock and that the permission for some time had been refused; that when he did get permission, the owner of a neighboring dock, which also would have had to be dredged in order for the plaintiff's dock to be dredged, refused his permission; and that the plaintiff had been given some assurance by the public officials that the defendant would attend to the dredging. *Ibid.*

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance during the same period of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

OFFICER.

DOG OFFICER, see that title.

Police officer, see POLICE.

Duties of an officer who has arrested a person without a warrant upon probable cause for believing that such person has committed a felony. *Keefe v. Hart*, 476.

ORDER.

Questions of fact which were held to be for the jury in an action of contract brought by trustee process, where the answer of the trustee admitted the possession of a sum of money due to the defendant and such fund in the hands of the trustee was claimed by a certain claimant as due to him under an order in writing signed by the defendant and addressed to the trustee, ordering the payment to the claimant of all money due to the defendant for teaming sand and old brick to a certain church. *Murray v. Haynes*, 373.

PARTITION.

The interest of a husband and wife in real estate held by them as tenants by the entirety cannot be severed, and a petition for partition will not lie. *Hoag v. Hoag*, 50.

Under R. L. c. 184, §§ 31 and 32, if all the parties interested in a partition of real estate request a determination of the questions at issue by the Probate Court, that court may exercise jurisdiction even where the shares may be found to be in dispute or uncertain. *Ruggles v. Jewett*, 167.

It seems, that upon a petition for partition, questions of law raised by the rulings of a judge upon the facts found by him at a hearing of the case without a jury, on which he ordered that an interlocutory judgment should be entered, may be brought before this court before the case is ripe for final judgment either by a bill of exceptions or by a report made by the judge under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cressey v. Cressey*, 191.

PARTNERSHIP.

What constitutes.

Certain contract between an inventor and another person, providing for the procuring of patents on a certain invention, the payment of a salary to the inventor and an ultimate division of profits, which was held not to make the parties partners. *Williams v. Knibbs*, 534.

Two persons, engaged in the manufacture of an article of merchandise and sharing the profits of the business, may be found to be members of a trading partnership, although one of them furnishes all the capital. *Phipps v. Little*, 414.

In an action of contract upon a promissory note against two defendants as copartners, where one defendant contended that the other defendant was not his partner but was employed by him under a contract by which he was to receive a percentage of the profits of the business as compensation for his services, evidence offered by the defendant so contending, to show that he made a contract with another person by which such other person was to receive a percentage of profits in addition to his weekly compensation, properly was excluded as immaterial. *Ibid.*

Authority of Partner.

A member of a trading partnership has implied authority to borrow money for partnership purposes and to make and deliver a promissory note therefor in the firm name. *Phipps v. Little*, 414.

Partnership (continued).

In an action against two defendants as copartners on a promissory note which was signed in the partnership name by one of the defendants, where the other defendant contends that, before the note sued upon was negotiated, he directed his partner to borrow no more money from the plaintiff, evidence to that effect rightly is excluded unless it also is shown that the plaintiff had notice of such limitation of authority or from the circumstances ought to have known of it. *Phipps v. Little*, 414.

Duties of Partners inter se.

Application of the general rule, that a partner will not be permitted to obtain for himself profits from carrying on a separate business of the same nature as that of the partnership, but must account to his copartners for such profits and for all benefits derived from transactions concerning partnership interests and property. *Holmes v. Darling*, 303.

Liability of Partners to Third Persons.

One who knowingly allows himself to be held out as a member of a trading partnership is liable for an indebtedness of the apparent partnership to one who by such holding out honestly has been misled into giving credit to such apparent partnership. *Phipps v. Little*, 414.

Partnership Name.

In an action against the members of a partnership on a promissory note, if the note sued upon bears a signature which is not strictly accurate as the firm name but which has been used by the defendants in the partnership business and by which the partnership is known commercially as well as by its true name, the difference between the correct name of the firm and the signature on the note is immaterial. *Phipps v. Little*, 414.

PASSENGER.

Actions by passengers against street railway corporations, see NEGLIGENCE, *Street Railway, Passengers*.

PAUPER.

In an action by a town under R. L. c. 81, § 9, for expenses alleged to have been incurred for the support of the defendant, a married woman, as a pauper, it was held that under the circumstances a previous determination by the board of overseers of the poor of the town, to charge the defendant's husband for the supplies in question, must be taken to be final. *Millis v. Frink*, 350.

PAYMENT.

In an action of contract, where the only defense relied upon is that the plaintiff received full satisfaction of his claim upon a judgment obtained by him in a previous action against a different defendant, the burden of proving such defense is upon the defendant, and it is not enough for him to show by the record in the former action that the issue in question might have

been litigated and decided in that action. In order to prevail he must show that in the former action the same issue was in fact litigated and determined. *Cote v. New England Navigation Co.* 177.
Case where it was held that such defense was made out on the evidence. *Ibid.*

PICKPOCKET.

As to an indictment and trial for an attempt to commit larceny from the person by picking a pocket, see ATTEMPT TO COMMIT LARCENY.

PLEADING, CIVIL.

Declaration.

Under R. L. c. 173, § 6, cl. 8, a plaintiff cannot recover under an account annexed for the breach of an executory contract to buy certain goods from the plaintiff, but must declare specially. *F. W. Stock & Sons v. Snell*, 449.

Answer.

In an action for the alleged breach of a contract to employ the plaintiff as the general manager of a paper mill for a period of five years, where the contract provided that, in case the plaintiff's work as general manager should not be satisfactory, the defendant might give him other work instead, and where it appears that the defendant gave notice to the plaintiff of such a change of work and that the plaintiff declined to accept such change, the defendant under an answer alleging a general denial may introduce evidence of damages suffered by the defendant through mismanagement by the plaintiff as tending to show that the plaintiff was deposed justifiably. *Bennett v. Kupfer Brothers Co.* 218.

PLEADING, CRIMINAL.

Indictment.

In an indictment charging that the defendant "did wilfully and maliciously expose certain poison . . . with intent that it should be taken or swallowed by cattle belonging to" a certain person, the word "cattle" is sufficiently definite to show a violation of R. L. c. 208, § 98, which in substance provides a penalty for administering or exposing poison with intent that it shall be taken or swallowed by "any horse, cattle or other beast of another person." *Commonwealth v. Cornell*, 135.

In an indictment for an attempt to commit larceny from the person of a person unknown by stealing property in his pocket, it is not necessary to describe the property attempted to be stolen or to allege its value, or to aver that the person unknown had anything in his pocket which could have been the subject of larceny. *Commonwealth v. Cline*, 225.

PLEDGE.

When one, who receives bonds in pledge from another to whom they had been entrusted by their owner for safe keeping, is liable for conversion, see *Varney v. Curtis*, 309.

PLUMBING.

A complaint, charging the defendant with a violation of St. 1909, c. 536, § 4, in that the defendant "did . . . do certain work in plumbing which was subject to inspection, . . . [he] . . . not being then and there registered or licensed as a journeyman plumber in accordance with the provisions of" the statute, was held to be sufficient. *Commonwealth v. Beaulieu*, 138.

And that statute was held to be constitutional. *Ibid.*

POLICE.

Constitutionality of St. 1911, c. 468, which extends the provisions of the civil service law to chiefs of police and city marshals of certain cities and towns. *Barnes v. Mayor of Chicopee*, 1.

The acceptance of St. 1911, c. 468, by a city makes applicable to its marshal the provision of St. 1906, c. 210, St. 1907, c. 272, that "Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior." *Ibid.*

Such provision is not restricted in its application to police officers who were appointed in accordance with the civil service rules, but applies to every person holding such an office at the time it became classified, however he was appointed. *Ibid.*

There is no such relation between a city and its police officers as will oblige it to pay them for their services unless provision is made therefor by statute, ordinance or contract, and when such provision is made, the right of recovery and the amount to be recovered for services are determined, limited and regulated by its express terms. *Riopel v. Worcester*, 15.

One, who was appointed and has served and been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he had received. *Ibid.*

Duties of an officer who has arrested a person without a warrant upon probable cause for believing that such person has committed a felony. *Keeffe v. Hart*, 476.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Constitutionality of St. 1911, c. 624, relating to petitions in police, district and municipal courts for reviewing the removal from office, lowering in rank or compensation, suspension or transfer of one holding office under the civil service. *Driscoll v. Mayor of Somerville*, 493.

The decision of a police, district or municipal court on a petition under St. 1911, c. 624, to review an order of a mayor removing the petitioner from office, is final and is not open to review on a petition for a writ of mandamus ordering the reinstatement of the petitioner. *Barnes v. Mayor of Chicopee*, 1.

PRACTICE, CIVIL.

Parties.

Whether a lessor in an action for rent due under a covenant in a lease properly can join as defendants the lessee and one who guaranteed the payment of the rent under a separate instrument, *quaere*. *Lumiansky v. Tessier*, 182.

One who receives from the holder an attested overdue non-negotiable promissory note, bearing an indorsement making it payable to the order of such recipient, takes it as an assignee and may bring an action against its maker for his own benefit in the name of the payee, although the payee forbids him to do so. *Pierce v. Talbot*, 330.

Indorser of Writ.

In an action in which the plaintiff is an inhabitant of the Commonwealth, the signature of the plaintiff's attorney under the words "From the office of" on the back of the writ is not an indorsement of the writ making the attorney liable for costs under R. L. c. 173, § 39, and such signature does not become an indorsement if the plaintiff after the action is brought and while it is pending removes from the Commonwealth. *Dooley v. Beane*, 601.

In case of such removal, if the defendant wants an indorser of the writ, he must ask for one under § 41 of the statute, unless the court of its own motion has required the plaintiff to procure such an indorser. *Ibid*.

Abatement.

No appeal lies to this court from an order of the Superior Court overruling an answer in abatement, such order being interlocutory. *Oliver Ditson Co. v. Testa*, 109.

Dismissal for Want of Prosecution.

If, under Rule 60 of the Superior Court, which provides for a calling of the civil docket after notice to parties and that "all suits which have remained without action for two years may be dismissed," such a suit is called and by order of the presiding judge the docket entry is made, "April sitting or dismissed," there is no absolute dismissal of the suit, and, if no further order of dismissal is made and the parties by mutual consent with the approval of the court postpone the trial of the case beyond the April sitting, the case remains pending during such postponements. *Burnham v. Haskell*, 386.

Discontinuance.

The plaintiff in an action at law against two defendants may discontinue his action as against one of them after a hearing by an auditor but before the case has been tried on its merits. *Lumiansky v. Tessier*, 182.

Claiming Jury.

Where a party to an action at law who has filed a claim for a jury afterwards files a waiver of such claim and the adverse party objects to the waiver and

Practice, Civil (*continued*).

asks for the jury, the question whether there shall be a trial by jury is to be determined by the presiding judge as a matter of discretion and such determination is not a subject for exception. *Graham v. Middleby*, 437.

Interrogatories.

Effect of the substance and the evasive character of certain answers of the treasurer of a corporation to interrogatories, propounded to him in an action against the corporation for personal injuries, where it was within the treasurer's power to answer fully. *D'Addio v. Hinckley Rendering Co.* 465.

Agreed Statement of Facts.

Upon an appeal from a decree dismissing a petition to establish a mechanic's lien which was submitted to the trial judge upon an agreed statement of facts containing no stipulation that inferences of fact might be drawn, the only question presented is whether upon the facts stated, without any deductions being drawn from them, the petitioner is entitled to a decree establishing his lien. *Shaughnessy v. Isenberg*, 159.

Auditor.

Report of an auditor in grade crossing proceedings has the force and effect of the report of a master in a suit in equity. *Mayor & Aldermen of Worcester v. Boston & Albany Railroad*, 567.

Rules of Court.

Rule 45 of the Superior Court. *James v. Boston Elevated Railway*, 424.

Rule 60 of the Superior Court. *Burnham v. Haskell*, 386.

Rule 64 of the Superior Court. *Drinkwater v. Frank*, 194.

Consolidation of Cases for Trial.

Discussion by Rugg, C. J., of three different methods by which cases at law and in equity may be consolidated. *Lumiansky v. Tessier*, 182.

Consolidation of a suit in equity by a lessee against his lessor, to enjoin the defendant from collecting any rent until he should perform the covenants and conditions of the lease according to the contention of the plaintiff, with an action at law by the lessee against the lessor for damages for an alleged breach of the covenants of the lease and an action at law by the lessor jointly against the lessee and a guarantor of the rent for damages for the plaintiff's alleged breach of the covenant to pay rent, which was held to be merely for convenience of trial, the two actions at law not having become merged in the suit in equity but still being pending, so that the separate judgments properly could be given in them. *Ibid.*

Election between Counts.

Where the declaration in an action of contract contains two counts, one on an instrument in writing purporting to be a promissory note and the other on an account annexed for money lent, if the plaintiff elects to rely on his

count for money lent and there is evidence to support it, he is entitled to go to the jury on that count. *Mistretta v. Cutulle*, 250.

Conduct of Trial.

Striking out testimony.

On an exception to the refusal of a presiding judge to strike out certain questions and answers that were not heard by the counsel for the excepting party, which was treated as waived because it was not argued, it was said that the matter clearly was one within the discretion of the presiding judge. *Sprague v. General Electric Co.* 375.

Requests, rulings and instructions.

After a verdict has been returned and ordered recorded, the deliberations of the jury are ended and no further instructions as to the questions raised at the trial properly can be given to them. *James v. Boston Elevated Railway*, 424.

An adverse finding by a trial judge, who has heard a case without a jury, without passing upon pertinent requests for rulings, is to be construed as a refusal of the rulings thus requested. *Hurley v. Boston Elevated Railway*, 192.

A presiding judge properly may refuse to make a ruling based on a fragmentary portion of the evidence. *Ayers v. Ratshesky*, 589.

At a hearing upon a writ of review, as in other proceedings, the trial judge cannot be required to make a ruling upon a detached portion of the evidence. *Welch v. Chase*, 519.

No exception lies to a refusal by a judge hearing a petition for a writ of review to rule that, if certain facts are found, the petitioner is entitled to a review. *Ibid.*

In an action against a milling company for damages due to its failure to perform a contract providing for the sale to the plaintiff of a certain quantity of meal at a certain price, it is proper for the judge to refuse to rule that in no event could the plaintiff recover more than the contract price. *Chandler Grain & Milling Co. v. Shea*, 398.

It is not necessary for a presiding judge to state to the jury the established rule, that the unexplained automatic starting of a machine when it ought to be at rest is evidence of a defect or want of repair, where evidence, relating to a simple device that has been brought into the court room and inspected, affords an explanation of the starting of the machine, and definite causes of starting have been discussed before the jury and the judge in his charge assumes that the plaintiff relies on such a definite cause and the plaintiff does not except to this assumption. *Cook v. Newhall*, 392.

Exceptions, by the defendant at the trial, to a failure of the judge to grant certain requests for rulings, which should have been given, were overruled because the defendant's counsel permitted the judge to act under a wrong impression as to the requests. *Williams v. Winthrop*, 581.

At the trial of an action against a street railway company to recover for personal injuries, the judge assumed that a certain ruling asked for was intended to call his attention only to the question of the plaintiff's due care, and it was held that the judge was justified in making such an assumption, and that, if the defendant wished to have the ruling made with reference to the

question of the defendant's negligence, he should have so requested in unmistakable language. *Hamilton v. Boston Elevated Railway*, 420.

At the trial of an action for the alleged breach of a contract in writing to sell certain land to the plaintiff, where there is evidence that the only authority of the person who signed the contract as the agent of the defendant was derived from his appointment by the defendant on Sunday, but the defense of the Lord's day act is not pleaded, if the judge instructs the jury in regard to the effect of the Lord's day act upon the contract, he properly cannot refuse to instruct them that, if the authority of the alleged agent was given by the defendant on Sunday, the creation of such agency was void. *Kryminski v. Callahan*, 207.

Interpretation of a certain ruling by a judge who heard without a jury an action against a street railway company for personal injuries received because a culvert, maintained by a town, gave way under the defendant's track, see *Sawin v. Connecticut Valley Street Railway*, 103.

Judge's charge.

Unless substantive error or injustice plainly appears, a general exception to specific portions of the charge of a judge to a jury will not be sustained, if no specific requests were made by the excepting party, pointing out his objections. *Hamilton v. Boston Elevated Railway*, 420.

Upon an exception to a statement contained in a charge of a presiding judge where nothing appears in regard to the rest of the charge, it will be assumed that full and appropriate instructions upon all pertinent questions of law were given. *Angely v. Springfield Street Railway*, 110.

An exception to a statement in the charge of a judge on the ground that it submitted a question of law to the jury will not be sustained where it appears that, if the jury passed upon the question of law, they decided it rightly so that the excepting party could not have been prejudiced. *Ibid.*

In an action against a corporation engaged in a general teaming business, for causing the death of the plaintiff's intestate, a boy seven years and five months of age, through the negligence of a driver of a dray of the defendant, where it appears that the accident happened after half past six o'clock in the evening, it is proper for the judge in his charge to suggest to the jury that they may consider whether it was the time of night when the driver was in a hurry to finish his work and to get home and feed his horses, although there has been no direct evidence that the driver was in a hurry. *Burns v. F. Knight & Son Corp.* 510.

Verdict.

In an action of contract to recover damages for the breach of an executory contract, where the declaration contains a special count on which the plaintiff is entitled to recover and a count on an account annexed on which he is not entitled to recover, and, the case having been submitted to the jury on both counts, a general verdict is returned for the plaintiff, exceptions of the defendant will be sustained and a new trial will be granted, because it cannot be known on which count the verdict was returned. *F. W. Stock & Sons v. Snell*, 449.

In a petition for the establishment of a mechanic's lien for lumber alleged to have been furnished under a contract and used for the construction of

a dwelling house, where a material question is, whether the lumber last delivered was used for the construction of a structure upon the land, the fact that a single issue, whether the lumber last delivered was furnished by the petitioner in good faith and under the contract, was submitted to a jury who answered it in the affirmative, does not preclude the respondent, at the hearing by a judge of an application for the establishment of the lien, from introducing evidence tending to show, nor the judge from finding upon conflicting evidence, that such lumber was not used for structures upon the land within the meaning of R. L. c. 197, § 1. *Curtis & Pope Lumber Co. v. Wolmer*, 456.

Setting aside Verdict.

A judge of the Superior Court has no power, after a verdict has been returned and recorded, to grant a motion of one party, without notice to the adverse party and in his absence, that the verdict be set aside and the case be reported to this court for determination. *James v. Boston Elevated Railway*, 424.

So much of Rule 45 of the Superior Court as provides that, "When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following," has no application to such action of a judge. *Ibid*.

Ordering Verdict.

In an action of contract for the alleged wrongful termination by the defendant of a contract to employ the plaintiff for one year, the presiding judge properly may refuse to rule, that, admitting that the plaintiff had been dismissed wrongfully from his employment, a verdict must be ordered for the defendant unless the plaintiff proves his actual loss by showing what he has done with his unemployed time and how much he has earned elsewhere; because even if such rule of damages should be applied, the plaintiff still would be entitled to nominal damages. *Dixon v. Volunteer Co-operative Bank*, 345.

So much of Rule 45 of the Superior Court as provides that, "When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto within twenty-four hours next following," has no application to the action of a judge in setting aside a verdict for the plaintiff after it has been returned and recorded and ordering the jury to return a verdict for the defendant. *James v. Boston Elevated Railway*, 424.

New Trial.

The denial of a motion for a new trial of a petition for a writ of review is a matter of judicial discretion and is not subject to exception. *Welch v. Chase*, 519.

The denial of a motion for a new trial, asked for on the grounds that the verdict was against the law, that it was against the evidence, and that it was against the law and the evidence, where the judge in denying the motion stated that he did so as a matter of discretion and that no ruling of law had been made, affords no ground for exception. *Casavant v. Sherman*, 23.

Practice, Civil (*continued*).

In an action of contract to recover damages for the breach of an executory contract, where the declaration contains a special count on which the plaintiff is entitled to recover and a count on an account annexed on which he is not entitled to recover, and, the case having been submitted to the jury on both counts, a general verdict is returned for the plaintiff, exceptions of the defendant will be sustained and a new trial will be granted, because it cannot be known on which count the verdict was returned. *F. W. Stock & Sons v. Snell*, 449.

Memorandum.

A memorandum filed by a judge before whom a proceeding at law has been tried without a jury, which states his findings of the material facts in the case and his rulings of law upon them without embodying them in a bill of exceptions or a report, is not a part of the record. *Cressey v. Cressey*, 191.

Interpleader.

Establishment, by a plaintiff in an action at law having only an equitable right to the proceeds of a certain promissory note, of his right to a dividend in the hands of the defendant, assignee for the benefit of creditors of the maker of the note, where all parties have been interpleaded under R. L. c. 173, § 37. *Nelson v. Piper*, 531.

Trustee Process.

See that title.

Grade Crossing Proceedings.

See GRADE CROSSING ACTS.

Review.

See that title.

Certiorari Proceedings.

See CERTIORARI.

Exceptions.

Delay in saving or in prosecuting.

Exceptions to the refusal of requests for rulings involved in the finding of a trial judge, who heard a case without a jury, must be taken within a reasonable time after the filing of such decision. Eighteen days after notice of the filing of the decision is not a reasonable time. *Hurley v. Boston Elevated Railway*, 192.

Delay in filing exceptions as laches barring a petition for a writ of review. *Welch v. Chase*, 519.

Construction and application of Rule 64 of the Superior Court, regulating the practice under St. 1911, c. 212, § 2, and providing that, where excep-

tions have remained without any action thereon for three months after filing, the clerk shall notify the parties, and that, if such exceptions are not presented for allowance within thirty days thereafter, they shall be dismissed as of course unless an order is made extending the time for hearing and allowance. *Drinkwater v. Frank*, 194.

A motion in the Supreme Judicial Court to dismiss a bill of exceptions filed in the Superior Court, on the ground that the exceptions were allowed on August 15 and were not entered in this court until the following October, cannot be allowed when the circumstances attending the entry are not before the court. *Daw v. Lally*, 578.

Allowance and disallowance.

An exception, to the disallowance of a bill of exceptions on the ground that the exceptions were not taken within a reasonable time after the rulings excepted to were made, properly can be alleged in a separate bill of exceptions. *Hurley v. Boston Elevated Railway*, 192.

Proper subjects for exception.

It seems, that upon a petition for partition, questions of law raised by the rulings of a judge upon the facts found by him at a hearing of the case without a jury, on which he ordered that an interlocutory judgment should be entered, may be brought before this court upon a bill of exceptions before the case is ripe for final judgment. *Cressey v. Cressey*, 191.

Improper subjects for exception: matters of discretion.

The denial of a motion for a new trial or hearing upon a petition for a writ of review is a matter of judicial discretion and is not subject to exception, *Welch v. Chase*, 519.

No exception lies to a refusal by a judge hearing a petition for a writ of review to rule that, if certain facts are found, the petitioner is entitled to a review. *Ibid.*

The denial of a motion for a new trial, asked for on the grounds that the verdict was against the law, that it was against the evidence, and that it was against the law and the evidence, where the judge in denying the motion stated that he did so as a matter of discretion and that no ruling of law had been made, affords no ground for exception. *Casavant v. Sherman*, 23.

Where only one party to an action at law files a claim for a jury and he afterwards files a waiver of such claim and the adverse party objects to the waiver and asks for a jury, the question whether there shall be a trial by jury is to be determined by the presiding judge as a matter of discretion and such determination is not a subject for exception. *Graham v. Middleby*, 437.

Construction of bill of exceptions.

Upon an exception to a statement contained in the charge of a presiding judge, where nothing appears in regard to the rest of the charge, it will be assumed that full and appropriate instructions upon all pertinent questions of law were given. *Angelary v. Springfield Street Railway*, 110.

Practice, Civil (*continued*).

Exceptions not properly taken.

An exception to a competent question put to a witness cannot be sustained on the ground that the answer to it was largely irresponsive and incompetent, if no motion was made to strike out the answer in whole or in part. *Rivers v. Richards*, 515.

Where at a trial no question is raised as to the qualification of a witness offered as an expert, such objection is not open on an exception to the admission of certain testimony given by him. *Ibid*.

Unless substantive error or injustice plainly appears, a general exception to specific portions of the charge of a judge to a jury will not be sustained, if no specific requests were made by the excepting party, pointing out his objections. *Hamilton v. Boston Elevated Railway*, 420

Whether excepting party was harmed.

An exception by a defendant to the erroneous admission at a trial of evidence introduced by the plaintiff will not be sustained, if the evidence erroneously admitted related only to a defense which, even if this evidence had been excluded, would not have been supported by the evidence of the defendant. *Cote v. New England Navigation Co.* 177.

An exception to a statement in the charge of a judge on the ground that it submitted a question of law to the jury will not be sustained where it appears that, if the jury passed upon the question of law, they decided it rightly, so that the excepting party could not have been prejudiced. *Angell v. Springfield Street Railway*, 110.

At the trial of an action of contract upon a judgment, the only question at issue was, whether the plaintiff had actual notice of bankruptcy proceedings of the defendant, and an exception by the defendant to the exclusion of a record of poor debtor proceedings instituted before the bankruptcy proceedings, showing a large number of short continuances, was overruled because it appeared that the judge permitted the defendant to introduce other evidence as to everything that took place in the poor debtor proceedings so that, even if the exclusion of the record was erroneous, the defendant was not shown to have been harmed. *Currier v. MacDonald*, 363.

In an action of contract to recover damages for the breach of an executory contract, where the declaration contains a special count on which the plaintiff is entitled to recover and a count on an account annexed on which he is not entitled to recover, and, the case having been submitted to the jury on both counts, a general verdict is returned for the plaintiff, exceptions of the defendant will be sustained and a new trial will be granted, because it cannot be known on which count the verdict was returned. *F. W. Stock & Sons v. Snell*, 449.

Upon an exception to the admission in evidence of a certain letter which was offered for the purpose of showing that a promissory note was procured by fraud, if it appears that the letter had no tendency to prove such fraud but contained nothing harmful to the excepting party, its admission will be treated as merely an immaterial error which will not justify this court in sustaining the exception and granting a new trial. *Lewiston Trust & Safe Deposit Co. v. Shackford*, 432.

If on the face of such a letter its materiality is not apparent, but the other

evidence is not reported and it cannot be said that in connection with such other evidence the letter would not have afforded material evidence of fraud, the exception must be overruled, because it is for the excepting party to show that he was aggrieved by the admission of the letter. *Lewis-ton Trust & Safe Deposit Co. v. Shackford*, 432.

In an action for causing the death of a child, where a verdict was returned for the plaintiff, an exception by him to the admission of certain evidence introduced by the defendant to show negligence on the part of the mother of the plaintiff's intestate who was in charge of her at the time of the accident, was not considered. *Mahoney v. Boston Elevated Railway*, 196.

An exception to the exclusion of a question to a witness will not be sustained where it does not appear what the witness's answer would have been. *Beauregard v. Benjamin F. Smith Co.* 259.

Error caused in part by conduct of excepting party's counsel.

Where, at the trial of an action against a street railway company for personal injuries, the defendant's counsel asked for a ruling which, so far as appeared from its wording, he might have intended to have applied either to the question of the due care of the plaintiff or to the question of the negligence of the defendant, and he did not make clear to which branch of the case he wished to have it applied, an exception by the defendant to a failure of the judge to give the ruling with regard to the question of the defendant's negligence cannot be sustained. *Hamilton v. Boston Elevated Railway*, 420.

Exceptions, by the defendant at a trial, to a failure of the judge to grant certain requests for rulings which should have been granted, were overruled because the defendant's counsel permitted the judge to act under a wrong impression as to the requests. *Williams v. Winthrop*, 581.

Report.

A judge of the Superior Court has no power, after a verdict has been returned and recorded, to grant a motion of one party, without notice to the adverse party and in his absence, that the verdict be set aside and the case be reported to this court for determination. *James v. Boston Elevated Railway*, 424.

If, in doing so, the judge files a memorandum stating that he agreed to report the case to this court and that, if his ordering of a verdict for the defendant was right, judgment is to be entered upon such verdict and "otherwise, judgment" is "to be entered for the plaintiff in the sum fixed by the jury," the rights of the plaintiff with regard to the propriety of the action of the judge are fully saved. *Ibid.*

It seems, that upon a petition for partition, questions of law raised by the rulings of a judge upon the facts found by him at a hearing of the case without a jury, on which he ordered that an interlocutory judgment should be entered, may be brought before this court by a report made by the judge under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cressey v. Cressey*, 191.

Appeal.

No appeal lies to this court from an order of the Superior Court overruling an answer in abatement, such order being interlocutory. *Oliver Ditson Co. v. Testa*, 109.

Practice, Civil (continued).

No appeal lies from a decree made by a single justice of the Supreme Judicial Court in a proceeding at law. The remedy is by exceptions unless the justice reports the questions raised. *Channell v. Judge of Central District Court*, 78.

No appeal lies to this court from the findings of fact or the rulings of law made by a judge before whom a proceeding at law has been tried without a jury, nor from an order to enter an interlocutory judgment, where no such judgment has been entered. *Cressey v. Cressey*, 191.

On an appeal from a decree of the Superior Court in favor of a claimant of funds attached by trustee process in the attempted enforcement of a decree for alimony in a bill for divorce, it was held that, the evidence not being before this court, the decree must be affirmed. *Mooney v. Mooney*, 114.

An appeal to this court in an action at law brings before the court only errors of law apparent on the record. *Mower v. Beard*, 198; *Given v. Johnson*, 251.

PRACTICE, CRIMINAL.

Complaint.

A complaint, charging the defendant with a violation of St. 1909, c. 536, § 4, in that the defendant "did . . . do certain work in plumbing which was subject to inspection, . . . [he] . . . not being then and there registered or licensed as a journeyman plumber in accordance with the provisions of" the statute, was held to be sufficient. *Commonwealth v. Beaulieu*, 138.

Bill of Particulars.

Upon an indictment for an attempt to commit larceny from the person, it is proper to deny a motion for a bill of particulars which asks only for a description of the property attempted to be stolen, this not being essential to the offense charged. *Commonwealth v. Cline*, 225.

Conduct of Trial.

Requests and rulings.

Proper refusal of a judge, presiding at a trial of an indictment for operating an automobile recklessly, to rule that, if, after it first was possible for the defendant to see a woman whom the automobile struck, he did everything that was possible to avert the accident, he could not be found guilty. *Commonwealth v. Horsfall*, 232.

Judge's charge.

At the trial of a criminal case, as in a civil one, the presiding judge under R. L. c. 173, § 80, has a right to "state the testimony" and may read to the jury his notes of the testimony of one of the witnesses. *Commonwealth v. Horsfall*, 232.

At the trial of an indictment under R. L. c. 1909, c. 534, § 22, for operating an automobile recklessly, a statement in the charge of the judge, to the effect that automobiles must be used very much as other vehicles must be used and that the driver's duty is to look out for persons and other vehicles on the highway, is correct. *Ibid.*

At the same trial, an instruction, that the care which the driver of an automobile must exercise "is proportionate to that instrumentality or engine which he has in charge," even if not expressed with precise technical accuracy, is correct in substance. *Commonwealth v. Horsfall*, 232.

Verdict.

On exceptions by the defendant at the trial of a certain indictment which contained three counts, where the defendant was found guilty on all counts and it appeared that the judge had charged the jury erroneously as to two of the counts which charged a different offense from that charged in the other count, it was ordered, that the new trial should be confined to the counts to which the erroneous instructions related and that the verdict of guilty upon the other count should stand. *Commonwealth v. Horsfall*, 232.

A verdict of not guilty on a count in an indictment charging the defendant with a violation of R. L. c. 208, § 98, in that he "did wilfully and maliciously administer" poison to "certain cattle belonging to" a certain person, is not inconsistent with a verdict of guilty on a second count in the same indictment charging the defendant with a violation of the same statute in that he "did wilfully and maliciously expose" poison "with intent that it should be taken or swallowed by cattle belonging to" the same person. *Commonwealth v. Cornell*, 135.

New Trial.

On exceptions by the defendant at the trial of a certain indictment which contained three counts, where the defendant was found guilty on all counts and it appeared that the judge had charged the jury erroneously as to two of the counts which charged a different offense from that charged in the other count, it was ordered, that the new trial should be confined to the counts to which the erroneous instructions related and that the verdict of guilty upon the other count should stand. *Commonwealth v. Horsfall*, 232.

Exceptions.

Numerous exceptions, which were designated by this court as without merit, relating to the admission of evidence at a trial for an attempt to commit larceny from the person. *Commonwealth v. Cline*, 225.

On exceptions by the defendant at the trial of a certain indictment which contained three counts, where the defendant was found guilty on all counts and it appeared that the judge had charged the jury erroneously as to two of the counts which charged a different offense from that charged in the other count, it was ordered, that the new trial should be confined to the counts to which the erroneous instructions related and that the verdict of guilty upon the other count should stand. *Commonwealth v. Horsfall*, 232.

Sentence.

A sentence of eighteen months in the house of correction for an attempt to commit larceny from the person was held to be authorized under R. L. c. 215, § 6, cl. 4, and c. 208, § 24. *Commonwealth v. Cline*, 225.

Arrest of Judgment.

An objection, in an indictment for a violation of R. L. c. 208, § 98, in exposing poison with intent that it should be swallowed by "cattle belonging to" a certain person, that the word "cattle" is not sufficiently definite, even if it were a valid objection to the indictment, would not be a ground for arresting judgment after verdict, since it would be a cause existing before verdict which did not affect the jurisdiction of the court. *Commonwealth v. Cornell*, 135.

Audrefois Acquit.

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance during the same period by the maintenance of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

PRESCRIPTION.

See ADVERSE USE.

PROBATE COURT.

Under R. L. c. 184, §§ 31 and 32, if all the parties interested in a partition of real estate request a determination of the questions at issue by the Probate Court, that court may exercise jurisdiction even where the shares may be found to be in dispute or uncertain. *Ruggles v. Jewett*, 167.

PROSTITUTION.

Acquittal in the municipal court on a complaint charging the defendant with maintaining a common nuisance by the maintenance of a tenement used for the illegal sale of intoxicating liquor, was held not to be a bar to a complaint for maintaining a common nuisance by the maintenance, during the same period, of a tenement resorted to for prostitution and lewdness. *Commonwealth v. Baldwin*, 238.

PROXIMATE CAUSE.

The owner of an automobile may maintain an action under R. L. c. 102, § 146, against the owner of a dog which caused the automobile to skid from the right hand side of a public way and to come directly in front of a horse, whereupon the horse reared and descended on the top of the automobile, injuring it, a finding being warranted that the dog was the proximate cause of the injury. *Williams v. Brennan*, 28.

PUBLIC OFFICER.

One, who was appointed and has served and has been paid as a reserve police officer of a city under an invalid ordinance, cannot recover on a *quantum meruit* for the excess of the value of his services above what he had received. *Riopel v. Worcester*, 15.

Acts of selectmen of a town in granting licenses to sell intoxicating liquors, and of the treasurer of the town in receiving the license fee and in paying a portion of it into the town treasury, are acts of public officers. *Brown v. Nahant*, 271.

A competent draw tender, employed to operate a draw by a town upon which the duty is imposed by statute to maintain the draw and employ such a draw tender, acts in the performance of his duties as a public officer and is not an agent of the town, and, if a traveller is injured by the negligence of such draw tender in operating the draw, his only remedy is against the draw tender personally. *Hawes v. Milton*, 446.

PUBLIC SERVICE CORPORATION.

The principles governing the exemption from taxation of certain property of public service corporations were held inapplicable in case of certain property of a street railway company. *Connecticut Valley Street Railway v. Northampton*, 54.

RAILROAD.

Location.

Abandonment by a railroad company of its location or of any part thereof is not to be inferred from mere non-user. *New York Central & Hudson River Railroad v. Chelsea*, 40.

Findings in a suit in equity by a railroad corporation and its lessee to establish their rights in a certain location through certain streets of the city of Chelsea, that no abutter upon the railroad location had acquired or had any right or interest in any part of the location by reason of any adverse use or occupation thereof, that there had been no abandonment or modification of the location which reduced its width, and that the location was valid to that width, were held to be warranted. *Ibid.*

A railroad corporation, which has leased its property to another railroad corporation but retains its corporate existence, can maintain a petition to the county commissioners under St. 1906, c. 463, Part II, § 78, for an order prescribing the limits within which the petitioner may take land that is necessary for additional tracks and which cannot be obtained by agreement with the owner, and upon such petition it is immaterial whether the lease made by the petitioner is valid or invalid. *Banaghan v. County Commissioners*, 17.

Authority of Agents.

It is not within the scope of the employment of a brakeman on a freight train, which is in charge of a conductor, to eject from the train a trespasser who is stealing a ride. *Harrington v. Boston & Maine Railroad*, 338.

Connecting Carriers.

In an action against a railroad corporation by the indorsee of a bill of lading for the loss of a part of the goods in transit, for which the plaintiff sought to hold the defendant liable as the last carrier, it was held that there was evidence warranting a finding that the defendant was the last carrier, and

Railroad (*continued*).

that another carrier in whose yard the goods were delivered to the plaintiff was the defendant's agent to haul the car to such yard, the use of which the defendant had hired for the delivery of the goods. *Shapiro v. Boston & Maine Railroad*, 70.

Freight Yard.

One who, while helping a teamster to unload to a wagon bricks from a car in a railroad freight yard, rests on the car between wagon loads, may be found to be acting within the scope of his employment while so resting and to be in the yard by an implied invitation of the railroad corporation. *Griswold v. Boston & Maine Railroad*, 12.

Liability for Negligence.

See NEGLIGENCE, *Railroad*.

REFERENDUM.

Constitutionality of a provision for a referendum in St. 1911, c. 468, relating to the extension of the civil service to the chiefs of police and city marshals in certain cities and towns. *Barnes v. Mayor of Chicopee*, 1.

RELEASE.

Where a building contractor, in consideration of the signing and delivering by a laborer to him of a release discharging him from all demands arising from certain personal injuries which the laborer had sustained because of the negligence of such contractor, agrees to pay to the laborer \$300 and, if the laborer is not able to resume work at the end of six weeks, to "make it right with" him, and the laborer signs and delivers the release and receives the \$300, a contract is made which is not void for indefiniteness, and the words "make it right" may be found to mean that in the contingency named the laborer shall have fair compensation for his injuries paid to him in money exceeding the \$300 already paid to him. *Brennan v. Employers Liability Assurance Corp.* 365.

RES INTER ALIOS.

See that subtitle under EVIDENCE.

RES IPSA LOQUITUR.

See that subtitle under EVIDENCE.

RES JUDICATA.

See JUDGMENT.

RESTRAINT OF MARRIAGE.

A provision in the will of a testatrix giving to two daughters named life estates in "the home place . . . , as long as they remain single," with a provision that on the marriage of either of them her life estate shall pass to her sister, followed by a clause making the same two daughters residuary devisees to whom "the home place" is devised subject to the life estates, is not against public policy as being in restraint of marriage. *Ruggles v. Jewett*, 167.

RESTRICTIONS.

EQUITABLE RESTRICTIONS, see that title.

REVIEW.

The denial of a motion for a new trial or hearing upon a petition for a writ of review is a matter of judicial discretion and is not subject to exception. *Welch v. Chase*, 519.

Therefore, although erroneous rulings of law made at a hearing upon a petition for the writ are subject to exception, no exception lies to the exercise by a judge of his discretionary power to determine whether, in view of all the circumstances and the situation of the parties interested, it is just and equitable to grant the writ. *Ibid.*

At a hearing upon a petition for a writ of review, as in other proceedings, the trial judge cannot be required to make a ruling upon a detached portion of the evidence. *Ibid.*

No exception lies to the refusal of the trial judge to rule at such a hearing, that if certain facts are found the petitioner is entitled to have the writ granted to him, even if the proof of such facts would have a strong bearing upon his right to a review, because there is no absolute right to have the writ granted and other considerations properly might affect the exercise of the discretion of the trial judge. *Ibid.*

Delay in filing exceptions in an action at law after the expiration of an extension of the time allowed for such filing may constitute laches on the part of a petitioner for a writ of review of the judgment in such action, although such petitioner otherwise may have good reason for applying for a writ of review and little wrong or injury may have resulted to the adverse party from the delay. *Ibid.*

If a judge of the Superior Court, after hearing a petition for a review of a final decree in a suit in equity, finds facts adverse to the allegations of the petition, such findings are not open to revision upon an appeal by the petitioner. *Day v. Mills*, 585.

RULES OF COURT.

See that subtitle under PRACTICE, CIVIL.

SALE.

What constitutes.

Action against a milling company by one of its customers upon a contract in writing, in which it appeared that before all of the meal had been called

Sale (continued).

for by the customer, the company's mills were destroyed by fire and the company refused to complete the delivery of the meal, and it was held that no title to the meal had passed to the customer before the fire, so that it was not the customer's meal that was destroyed and the company might be found liable for refusing to complete delivery. *Chandler Grain & Milling Co. v. Shea*, 398.

Modification of Terms.

Evidence from which it was held that a certain contract for the sale of goods, made by correspondence, afterwards was modified in the same way. *Bristol Manuf. Corp. v. Arkwright Mills*, 172.

Delivery.

Evidence upon which it was held that a finding might have been made that goods, manufactured under a contract for the defendant by the plaintiff and held by the plaintiff in accordance with instructions of the defendant, were appropriated to the defendant and therefore, although in the plaintiff's warehouse, were delivered to the defendant. *Bristol Manuf. Corp. v. Arkwright Mills*, 172.

Conditional.

A person in possession of chattels as the vendee under a contract of conditional sale has a special property in them which he can mortgage. *Keepers v. Fleitmann*, 210.

Rescission.

In a suit in equity against a savings bank for a rescission of a sale and assignment to the plaintiff of an overdue mortgage of real estate and a return to the plaintiff of the purchase money, it was held that the evidence warranted findings that there had been a mutual mistake as to the property covered by the mortgage, that the plaintiff had not been guilty of negligence in relying upon representations of the defendant's president, and that the defendant could be put *in statu quo*, so that the plaintiff was entitled to relief. *Shapira v. Wildey Savings Bank*, 498.

Trade Talk.

It is not the tendency of the law to-day to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk. By RUGG, C. J. *Noyes v. Meharry*, 598.

SALEM.

In the construction of St. 1912, Part III, § 1, with regard to the vote at an election in Salem as to whether the city's charter should be repealed, it was held that the words of the statute, the "majority of the ballots cast at said election," meant a majority of the votes cast upon that question, and not a majority of all the votes cast at the election, and that the charter was repealed. *Cashman v. City Clerk of Salem*, 153.

SATISFACTION OF CLAIM.

In an action of contract, where the only defense relied upon is that the plaintiff received full satisfaction of his claim upon a judgment obtained by him in a previous action against a different defendant, the burden of proving such defense is upon the defendant, and it is not enough for him to show by the record in the former action that the issue in question might have been litigated and decided in that action. In order to prevail he must show that in the former action the same issue was in fact litigated and determined. *Cote v. New England Navigation Co.* 177.

Case where it was held that such defense was not made out on the evidence. *Ibid.*

SAVINGS BANK.

Evidence which was held to warrant findings that two deposits made by one P in a savings bank, one under the title, "P payable in case of his death to K," and the other under the title "K payable in case of her death to P," were given by P to K before P's death. *Wade v. Smith*, 34.

Execution, by a woman about to undergo a surgical operation which she believed she would not survive, of an assignment of a savings bank deposit to her stepson, and delivery of the bank book and assignment to an attorney at law to be sent to the stepson in case of her death, was held not to constitute a *donatio causa mortis*, where it was understood between the woman and the attorney that he was to hold the documents as her agent and not as the agent of the stepson. *Stratton v. Athol Savings Bank*, 46.

SCIRE FACIAS.

Principles as to the liability of the defendant in an action of scire facias on a judgment against a trustee in an action brought by trustee process. *Cavanaugh v. Merrimac Hat Co.* 384.

SNOW AND ICE.

Under the provision of St. 1908, c. 305, that a notice of injuries resulting from snow or ice may be left with the occupant of the premises, "or, in case there is no occupant," may be posted in a conspicuous place thereon, if the premises consist either of a double house containing four tenements, of which one is vacant and the other three are occupied, or of a single house, containing two tenements, of which one is vacant and the other occupied, notice cannot be given by posting, which can be done only "in case there is no occupant." *Sullivan v. Wilson*, 342.

At the trial of an action for injuries so received it was held that evidence, that the plaintiff's agent rang the door bell and knocked on the door of the lower tenement on the corner, which was unoccupied, but did not ring the door bell of the upper tenement on the corner nor the door bell of either of the other two tenements, and that he made no inquiries in the neighborhood as to whether the house was wholly unoccupied, and testimony of the plaintiff's attorney to the effect that by the outward appearance of the building it was unoccupied, do not warrant a finding

Snow and Ice (*continued*).

that there was no occupant of the house, whether it was a single house or a double one. *Sullivan v. Wilson*, 342.

Under St. 1908, c. 305, the leaving of a notice with the occupant and the posting of a notice in a conspicuous place are different things, and a notice posted on the outside of a vacant tenement, which is one of two tenements of a single house or one of four tenements of a double house, is not left with the occupant of the house. *Ibid*.

SPRING.

In a deed conveying an acre of land and providing that the grantee "is to have with said acre a spring of water northeast of said land near an apple tree," the description of the spring is not void for uncertainty if when its language is applied to the surface of the earth it identifies a particular spring. *Tinker v. Bessel*, 74.

A deed, after describing an acre of land conveyed in fee, continued as follows: "The said [grantee] is to have with said acre a spring of water northeast of said land near an apple tree, with the right to bring it on to said premises." The spring was identified by the description. *Held*, that the deed conveyed in fee so much of the land out of which the spring issued as was necessary for the reasonable use of the spring as well as a right to the water. *Ibid*.

In a suit in equity to restrain the defendant from interfering with the plaintiff's right, created by deed, to the use of a certain spring surrounded by land of the defendant, it was held that, even if a title in fee such as the plaintiff acquired under the deed could be lost by non-user and abandonment, the question, whether the plaintiff had abandoned his right, was one of fact to be determined on all the evidence. *Ibid*.

In a suit in equity to restrain the defendant from interfering with the plaintiff's use of a certain spring surrounded by land of the defendant and conveyed by the defendant's predecessor in title in fee to the plaintiff's predecessor in title, it appeared that the defendant and his predecessor in title had used the spring continuously for more than thirty years, but that the quantity of water thus used was much less than the capacity or normal flow of the spring, and it was held that the prescriptive right to draw water from the spring acquired by the defendant was measured by the amount of water actually withdrawn, and that no title to the entire spring was acquired. *Ibid*.

STATUTE.

Violation of a statute as evidence of negligence, see NEGLIGENCE, *Violation of Statute*.

A statute providing an exemption from taxation should be construed strictly. *Milford v. County Commissioners*, 162.

Statutes cited and expounded, see page 717.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 717.

STREET RAILWAY.

Taxation.

Land, purchased by a street railway corporation for the purposes of its railway under authority of a statute giving it the right to acquire such land by purchase or lease but not the right to take it by eminent domain, is not exempt from taxation. *Connecticut Valley Street Railway v. Northampton*, 54.

St. 1909, c. 439, § 1, relating to the taxation of poles and wires, which amends R. L. c. 12, § 23, as amended by St. 1902, c. 342, exempts from local taxation no real estate of a street railway company on which it maintains its tracks. *Ibid.*

Maintenance of Roadbed.

The grant to a street railway company of the privilege of laying tracks and running cars upon a highway for the transportation of passengers by necessary implication includes the power and imposes the obligation to construct and maintain within the limits of the highway such foundations and supports as are required for the reasonable conduct of its business and the safety of its passengers. *Savin v. Connecticut Valley Street Railway*, 103.

Rule of the Road as to Passing Vehicles.

The provision of R. L. c. 54, § 2, that "the driver of a carriage or other vehicle passing a carriage or other vehicle travelling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way," applies to the driver of an automobile who is attempting to pass a street railway car travelling in the same direction. *Foster v. Curtis*, 79.

Duty as to Starting Signal.

If an electric street car is stopped to receive passengers, it is the duty of the conductor, before giving a signal to start the car, to ascertain, if he can do so by the exercise of due care, caution and diligence, that all who desire to board the car had an opportunity to do so and that no person is attempting to get on the car under such circumstances as would make it dangerous to signal for the starting of the car. *Hamilton v. Boston Elevated Railway*, 420.

Duty as to Crowds.

A street railway company is liable for an injury to a passenger on one of its cars caused by its failure to take reasonable precautions to guard the passengers from the rushing of a waiting crowd to board the car at a time and place when such action of the crowd ought to have been anticipated. *Morse v. Newton Street Railway*, 595.

Liability for Negligence.

See NEGLIGENCE, *Street Railway*.

SUBWAY.

Action by a passenger against the Boston Elevated Railway Company for injuries received while using an escalator in the Washington Street tunnel, in which it was held that there was no evidence that the defendant was responsible for the adoption or use of the escalator in question, since it was adopted and installed by the Boston Transit Commission. *Theall v. Boston Elevated Railway*, 327.

Elevators in East Boston Tunnel were held to be "entrances" and not "equipment." *Boston v. Boston Elevated Railway*, 407.

SUMMARY PROCESS FOR POSSESSION OF LAND.

In a summary process under R. L. c. 181, for the possession of certain premises that had been occupied by the defendant under a lease from the plaintiff which had been terminated for non-payment of rent by a notice in writing under R. L. c. 129, § 11, given by the plaintiff to the defendant one month before the date of the writ, it is no defense that an action is pending for the possession of the same premises, brought by the plaintiff against the defendant under the same statute in a municipal court about seven months before the date of the writ in the present action, in which the plaintiff obtained judgment and the defendant appealed to the Superior Court, filing a bond as required by R. L. c. 181, § 6. *Proctor v. Moran*, 405.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Application of Rule 60, see *Burnham v. Haskell*, 386.

Application of Rule 64, see *Drinkwater v. Frank*, 194.

A judge of the Superior Court has no power, after a verdict has been returned and recorded, to grant a motion of one party, without notice to the adverse party and in his absence, that the verdict be set aside and the case be reported to this court for determination. *James v. Boston Elevated Railway*, 424.

Where a statute of another State provides that "any marriage contracted by a person below the age of consent . . . may in the discretion of" a certain court of that State "be annulled at the suit of the party who at the time of contracting such marriage was below the age of consent," a marriage contracted in that State between parties, one of whom was below the age of consent, if it is not in violation of R. L. c. 151, §§ 1-5, is valid here until it has been annulled by the State where it was solemnized, and the Superior Court of this Commonwealth has no jurisdiction of a petition for annulment of such a marriage. *Levy v. Downing*, 334.

SUPREME JUDICIAL COURT.

A certain rescript of this court in a suit in equity in the Superior Court for the redemption of certain land from a mortgage, directing that the final decree for the plaintiff be modified by giving to the defendant costs, and that the decree as thus modified was to stand, was held not to be a decree, but to be an order for a decree, leaving to the Superior Court, under R. L. c. 173, § 48, power so to amend the former decree as to determine as of the date of the final disposition of the suit the obligations of the defendant to the plaintiff in the matter involved in the suit. *Day v. Mills*, 585.

No appeal lies from a decree made by a single justice of the Supreme Judicial Court in a proceeding at law. The remedy is by exceptions unless the justice reports the questions raised. *Channell v. Judge of Central District Court*, 78.

No appeal lies to the Supreme Judicial Court from an order of the Superior Court overruling an answer in abatement, such order being interlocutory. *Oliver Ditson Co. v. Testa*, 109.

SURVIVAL OF ACTIONS.

A contract under seal for the sale to a testator of certain securities, which provided for payment ninety days from the date of the contract in part in cash and in part by the testator's interest bearing promissory notes, and for the deposit with a trust company as escrows within the ninety days of all the documents to be paid or delivered by either party to the other, and which closed with the express stipulation that it should be "binding upon and inure to the benefit of the respective heirs, executors and administrators" of the parties, "as to each and all of its provisions, whether so expressed in appropriate words or not," was held, upon the death of the testator forty-two days after the date of the contract without his having made any of the deliveries called for by the contract, not to be enforceable against the executor of his will. *Browne v. Fairhall*, 290.

And it also was held that the express stipulation that the contract should bind the heirs, executors and administrators of the parties referred only to the performance of the obligations growing out of the contract after all the papers and instruments required by it had been delivered as escrows to the trust company. *Ibid.*

TAX.

Assessment.

Where land is owned by tenants in common, the assessment of a tax upon the undivided interest of one of the tenants in common is invalid. *Curtiss v. Sheffield*, 239.

Exemption.

A statute providing an exemption from taxation should be construed strictly. *Milford v. County Commissioners*, 162.

The personal property of a private cemetery corporation is not exempted from taxation by St. 1909, c. 490, Part I, § 5, cl. 3, relating to the exemp-

Tax (*continued*).

tion from taxation of property of literary, benevolent, charitable and scientific institutions. *Milford v. County Commissioners*, 162.

St. 1909, c. 439, § 1, relating to the taxation of poles and wires, which amends R. L. c. 12, § 23, as amended by St. 1902, c. 342, exempts from local taxation no real estate of a street railway company on which it maintains its tracks. *Connecticut Valley Street Railway v. Northampton*, 54.

Land, purchased by a street railway corporation for the purposes of its railway under authority of a statute giving it the right to acquire such land by purchase or lease but not the right to take it by eminent domain, is not exempt from taxation. *Ibid*.

A person aggrieved by an assessment of a tax on personal property is not required to pay the tax under protest and sue to recover the amount paid, but may proceed in the first instance by a petition for an abatement. *Milford v. County Commissioners*, 162.

Under St. 1909, c. 490, Part I, § 76, a finding of fact by a board of county commissioners, upon a petition for the abatement of a tax, that there was good cause for delay in bringing in to the assessors the list required by the statute, raises no question of law upon the record which is open to review upon a writ of certiorari, and this applies to a finding that an omission to bring in such a list by a corporation seeking exemption from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3, was not wilful. *Ibid*.

Lien.

Review by HAMMOND, J., of legislation in the Province and the Commonwealth in regard to tax liens. *Curtiss v. Sheffield*, 239.

Sale.

Suits in equity to set aside tax deeds, see EQUITY JURISDICTION, *To set aside Tax Deed*.

Redemption.

A suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale of which the plaintiff had notice less than four months before the filing of the bill, may be brought by a prior attaching and judgment creditor of the owner to whom the tax was assessed, the words in § 61, "any person having an interest in any such land," including an attaching creditor, whether the word "owner" in § 59 includes an attaching creditor or not. *Union Trust Co. v. Reed*, 199.

In such a suit against the owner, the purchaser at the tax sale and two other attaching creditors, it was held that the defendant attaching creditors could be given relief only upon their filing cross bills and showing themselves to be entitled to it. *Ibid*.

TENANTS BY ENTIRETY.

Under a deed of real estate to a husband and wife, described as such, made after St. 1885, c. 237, by the habendum clause of which the grantees are to hold the property "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors heirs and assigns, to their own

use and behoof forever," the grantees take not as simple joint tenants but as tenants by the entirety. *Hoag v. Hoag*, 50.

The interest of a husband and wife in real estate held by them as tenants by the entirety cannot be severed, and a petition for the partition will not lie. *Ibid.*

TENDER.

Suit in equity for specific performance of an agreement by the defendant to convey real estate to the plaintiff, which was held properly to have been dismissed because the plaintiff had made no tender of the purchase price and the defendant had not waived the necessity of such a tender. *Smith & Rice Co. v. Canady*, 122.

THEATRE.

St. 1904, c. 450, which requires, in towns and in all cities other than Boston, that a license for the building in which a theatrical entertainment is to be given shall be obtained from the chief of the district police, does not dispense with the necessity of obtaining also from the mayor of the city or the selectmen of the town the license for such an entertainment required by R. L. c. 102, § 172, as amended by St. 1905, c. 341. *Commonwealth v. McGann*, 213.

And R. L. c. 102, § 172, as amended by St. 1905, c. 341, is constitutional. *Ibid.*

Action for deceit by means of alleged false and fraudulent representations in regard to the net profits from the business of a moving picture theatre, whereby the plaintiff was induced to purchase the business, in which it was held that there was evidence warranting the submission to a jury of the questions, whether the representations made by the defendant were false and fraudulent and whether the plaintiff relied upon them. *Noyes v. Meharry*, 598.

In such an action it cannot be said, as a matter of law, that the fullest opportunity to examine a moving picture theatre would demonstrate the truth or falsity of statements as to the net profits derived from it. *Ibid.*

Under a certain lease of a building for a moving picture show, providing that "a license, for operating" the "show on the premises as now equipped, has been obtained," a revocation of the license, due to failure of the lessee to perform his obligations under the lease as to interior repairs, was held to give him no claim upon the lessor and not to excuse him from his obligation to pay the stipulated rent. *Lumiansky v. Tessier*, 182.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRUST.

What constitutes.

Express.

The transfer of certain shares of the capital stock of a corporation by the owner to a person who signed a certain memorandum, was held not to constitute

Trust (continued).

such person a trustee, but it was held that he was merely an agent for the owner, so that an attempted gift to another person designated in the memorandum to take effect after the death of the owner was void, and the executor of the will of the owner was entitled to the shares. *Russell v. Webster*, 491.

Constructive.

Where a woman client of an attorney at law, reposing trust and confidence in such attorney, employs him to attend a foreclosure sale of real estate and to purchase the property in her name to protect her interests, and the attorney, instead of doing this, causes the property to be purchased at the sale for his own benefit and afterwards sells it at a profit, for which he refuses to account to his client, he holds the proceeds of the sale subject to a constructive trust for the benefit of his client, who can maintain against him a suit in equity for an accounting. *Rolikatis v. Lovett*, 545.

Construction of Trust Instrument.

Where a will provided that the income of the estate "remaining" after certain payments to the testator's widow and to such of his daughters as then should have become married or thereafter should marry, should be paid to such of the daughters "as shall be unmarried so long as they or she shall remain unmarried," it was held that no income was intended to be paid to a daughter after she became married, although she should become a widow. *Russell v. Lilly*, 529.

The trust created by a direction in a will that a trust fund should be paid "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the Asylum of the Corporation," was held to create a trust for a charitable purpose. *Richards v. Church Home*, 502.

As to the same will it was held that the testatrix, by the words "Asylum of the Corporation," meant the McLean Asylum. *Ibid.*

Charitable.

A direction in a will that a trust fund should be paid "to the Massachusetts Hospital Life Insurance Company, to be used only, so far as the same will go, to provide free treatment for the insane in the Asylum of the Corporation," was held to create a trust for a charitable purpose. *Richards v. Church Home*, 502.

As to the same will it was held that the testatrix, by the words "Asylum of the Corporation," meant the McLean Asylum; that, as the trustee designated in the will could not act, it merely was necessary to appoint a new trustee; and that under the circumstances it was fitting that the Massachusetts General Hospital should act as such trustee. *Ibid.*

Executor acting as Trustee.

The fact that one, who was named and has been appointed executor of a will and to whom as a trustee property was given by the will, having given a bond as executor, fails to procure his formal appointment or to give a

bond as such trustee, does not show conclusively that he has declined to act in that capacity; and therefore a sale by him of trust property is not necessarily void solely for that reason. *Coates v. Lunt*, 401.

Where Trustee named cannot act.

Where a trustee designated by a will cannot act and the purposes of the trust are capable of ascertainment, the court needs only to appoint a new trustee to carry out those purposes. *Richards v. Church Home*, 502.

Conduct of Trustee.

In a suit by a trustee under the will of one of two sisters who were joint trustees of certain real estate for their own benefit, to compel the children of the other sister, who had sold to the first sister her interest in the real estate, to make formal conveyance of the property which such sister ineffectually had attempted to convey, it was held that after the sale the purchasing sister held the interest of the first sister in the real estate absolutely and was not required to pay any income from it to the children of her sister. *Coates v. Lunt*, 401.

In the same suit it also was held that, for any failure on the part of the first sister to distribute properly the income of the remaining trust property, there was ample remedy in the Probate Court, so that such failure furnished no equitable reason for withholding from the plaintiff the proper conveyance of the real estate. *Ibid.*

TRUSTEE PROCESS.

On an appeal from a decree of the Superior Court in favor of a claimant of funds attached by trustee process in the attempted enforcement of a decree for alimony in a libel for divorce, it was held that, the evidence not being before this court, the decree must be affirmed. *Mooney v. Mooney*, 114.

Whether in such a proceeding the rights of an intervenor ought to be considered, was not decided, because it did not appear that any objection on this ground had been made in the court below. *Ibid.*

Questions of fact which were held to be for the jury in an action of contract brought by trustee process, where the answer of the trustee admitted the possession of a sum of money due to the defendant and such fund in the hands of the trustee was claimed by a certain claimant as due to him under an order in writing signed by the defendant and addressed to the trustee, ordering the payment to the claimant of all money due to the defendant for teaming sand and old brick to a certain church. *Murray v. Haynes*, 373.

In an action of scire facias on a judgment by which the defendant has been charged as trustee in an action brought by trustee process, the defendant should be placed in no worse position than if he were defending an action brought against him by the defendant in the trustee process for the collection of the alleged debt by reason of which he has been adjudged a trustee, and if, because of pending actions brought by third persons against such trustee affecting the amount and the existence of his indebtedness to the

Trustee Process (continued).

defendant in the trustee process, the state of the account between them cannot be ascertained, there must be a judgment for such trustee as the defendant in scire facias. *Cavanaugh v. Merrimac Hat Co.* 384.

UNDUE INFLUENCE.

Deed of an aged man conveying real estate through a third person to his wife, who conveyed it to her nephew, which was set aside because it was procured by undue influence of the wife and nephew. *Smith v. Kenney*, 6.

UNITED STATES MAIL.

Action by a mail clerk for personal injuries caused by a defective mail wagon. *Davis v. Crisham*, 151.

USAGE.

See **CUSTOM.**

VERDICT.

See that subtitle under **PRACTICE, CIVIL** and under **PRACTICE, CRIMINAL**.

VETERAN.

The principal provisions of R. L. c. 19, known as the civil service act, are constitutional, without regard to the validity of the provisions relating to the veterans' preference, which are distinct and severable from the rest of the statute. *Barnes v. Mayor of Chicopee*, 1.

WAIVER.

A waiver by the indorser of a promissory note of demand upon the maker is not a waiver of notice of the maker's default. *Hall v. Crane*, 326.

WARRANTY.

Breach of a certain warranty in a policy insuring against loss or damage by fire to an automobile, which prevented a recovery thereafter on the policy. *Elder v. Federal Ins. Co.* 389.

WAY.

Private.

Creation.

In an action of tort for the obstruction of a private way, in which it appeared that, in accordance with a certain personal agreement with a predecessor in title of the plaintiff contained in a clause of a deed to a predecessor of the defendant of a part of its location which divided the farm, the way across the location was constructed by the corporation, it was held, that the clause could not operate as an exception, because it created a new right

of way, nor as a reservation of an easement in fee because the word "heirs" was not used, so that the action at law could not be maintained. *Childs v. Boston & Maine Railroad*, 91.

In the same case it was said, that the clause created an equitable easement founded on contract, which could be enforced in equity. *Ibid*.

In an action for the obstruction of a right of way alleged to have been acquired by prescription, certain evidence was held rightly to have been admitted of a conversation between the deceased predecessor in title of the defendant and the husband of the plaintiff's predecessor in title tending to show that the use of the way by the plaintiff's predecessor in title was permissive and not adverse. *Daw v. Lally*, 578.

Extent of easement.

In a deed conveying to the plaintiff certain land with "the necessary use of a private way from" a certain public way "as now used across our premises on the east and on the south sides of said house to the within granted premises," it was held that the words "necessary use" meant such use as was reasonably necessary to the full enjoyment of the plaintiff's land, and that the words "as now used" were descriptive of the location of the way and not of the nature or manner of its use. *Crosier v. Shack*, 253.

In the same case it further was held that the use reasonably necessary to the plaintiff's full enjoyment of the premises might vary from time to time with what constituted such full enjoyment, so that the plaintiff was entitled to a decree protecting him in his right to the use of the way for driving an automobile as well as for driving a paint cart. *Ibid*.

Maintained by municipality.

If a town, holding common land within its limits on a bluff facing the sea, which is not required at the time for any public purpose, lays out such land in house lots, which it leases to tenants for a substantial rental, this is not *ultra vires*, and the town is liable to one of its tenants, in the same way that a private owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants. *Davis v. Rockport*, 279.

As to adjacent land.

Public.

A city taking land under statutory authority for the widening of a highway is not obliged to grade the way to the level of adjacent land or to construct approaches from such land. If the owner of such adjacent land is compelled to incur expense in order to provide access to the way from his land, such expense will be taken into account in assessing his damages for the taking. *Preston v. Newton*, 483.

A city which has taken land under statutory authority for the widening of a highway has no authority also to take an easement of slope in adjoining land for the purpose of grading it to connect with the way, as the statutes which authorize the laying out and widening of public ways do not authorize the taking of land for any purpose less than a way. *Ibid*.

Petition for damages for taking.

Where land is taken by a city under statutory authority for the widening of a highway, and the owner of such land has filed and prosecuted a petition

for damages for the taking, such owner by the prosecution of his petition admits that the proceedings for the taking of his land were legal and regular, and the remedy provided by the statute for compensation is exclusive. *Preston v. Newton*, 483.

Duty of street railway company as to.

The grant to a street railway company of the privilege of laying tracks and running cars upon a highway for the transportation of passengers by necessary implication includes the power and imposes the obligation to construct and maintain within the limits of the highway such foundations and supports as are required for the reasonable conduct of its business and the safety of its passengers. *Sawin v. Connecticut Valley Street Railway*, 103.

Defect.

In an action by a woman against a town for personal injuries alleged to have been caused as she, an experienced driver, was driving a team on the way in question and was turning into an intersecting street, by her running into two depressions, with a mound between them, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the accident was caused by a defect in the way, were for the jury. *Williams v. Winthrop*, 581.

At the trial of an action against a town for personal injuries alleged to have been sustained by reason of depressions in a public way which caused the plaintiff's carriage to tip and throw him out, evidence, that on previous days other wagons had been seen to go up and down and tip at the same place, is inadmissible for the purpose of showing a defect in the way or to prove notice to the defendant of the defect. *Ibid.*

One driving on a public highway an automobile which is not registered or to be "regarded as registered" in accordance with the statutes, cannot maintain an action for personal injuries caused by a defect in the highway, because he is a trespasser thereon. *Holland v. Boston*, 580.

In an action against a city for personal injuries alleged to have been sustained by reason of a defect in a highway when the plaintiff was driving an automobile which he owned but which was not registered, it was held that the question, whether the automobile was controlled by a dealer in automobiles, by whom the plaintiff was employed, and bore his general distinguishing mark, so as to be "regarded as registered" under St. 1907, c. 580, § 2, was for the jury. *Ibid.*

A town, which is required by statute to maintain the half of the draw of a bridge that lies within its limits, is not liable under R. L. c. 51, § 18, for an injury to a traveller on the bridge caused by the temporary opening of a trap door on its side of the draw for the purpose of adjusting the sections of the draw after a vessel had passed through it, as such a transitory condition does not constitute a defect in the bridge within the meaning of the highway act. *Hawes v. Milton*, 446.

Want of sufficient railing.

In an action against a town for an injury to the horse of the plaintiff, alleged to have resulted from a want of a sufficient railing on a public way, it appeared that the land adjoining the way was two and a half feet

below the level of the road and that the defendant maintained on the top of the retaining wall a one-rail fence, and it was held that the question, whether the defective railing was the sole cause of the injury, was one of fact to be submitted to the jury. *McMahon v. Harvard*, 20.

WIDOW.

Under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, the widow of a man who died intestate without issue takes a one half interest in real estate in which her husband at the time of his death had a vested remainder subject to a life estate that terminated after his death. *Walden v. Walden*, 418.

WILL.

A provision in the will of a testatrix giving to two daughters named life estates in "the home place . . . , as long as they remain single," with a provision that on the marriage of either of them her life estate shall pass to her sister, followed by a clause making the same two daughters residuary devisees to whom "the home place" is devised subject to the life estates, is not against public policy as being in restraint of marriage. *Rugles v. Jewett*, 167.

See also DEVISE AND LEGACY.

WITNESS.

Impeachment.

It seems, that, where a record of conviction of a crime is offered in evidence to impeach the credibility of a witness, the mere fact that the name of the person convicted is the same as that of the witness does not make the record admissible without corroborating evidence of identity. *Ayers v. Ratshesky*, 589.

Certain other evidence, at a trial of an action of tort for personal injuries from being run into by an automobile of the defendant by reason of the negligence of the defendant's servant who was driving the automobile, which, combined with the identity of name, warranted an inference that the court record applied to the defendant's driver, and accordingly that such record was admissible to impeach his credibility as a witness. *Ibid.*

WORCESTER.

In proceedings under St. 1900, c. 387, as amended by St. 1902, c. 508, St. 1903, c. 115, and St. 1905, c. 422, providing for the abolition of grade crossings in the city of Worcester, certain rulings of an auditor, based on findings made by him, were held to be right. *Mayor & Aldermen of Worcester v. Boston & Albany Railroad*, 567.

WORDS.

"Abortion." See *Commonwealth v. Smith*, 563, 565, 566, 567.

"Actual cost." See *Mayor & Aldermen of Worcester v. Boston & Albany Railroad*, 567, 571.

Words (*continued*).

- "As now used." See *Crosier v. Shack*, 253, 256.
- "At their pleasure." See *Commonwealth v. McGann*, 213, 215.
- "Ballots." See *Cashman v. City Clerk of Salem*, 153, 155, 157, 158.
- "Cattle." See *Commonwealth v. Cornell*, 135, 136.
- "Conversion." See *Varney v. Curtis*, 309, 317, 318.
- "Election." See *Cashman v. City Clerk of Salem*, 153, 157.
- "Entrances." See *Boston v. Boston Elevated Railway*, 407, 412.
- "Knowingly." See *Commonwealth v. Horsfall*, 232, 234, 236, 237.
- "Land." See *Curtiss v. Sheffield*, 239, 244.
- "Liberty of the press." See *Commonwealth v. McGann*, 213, 216.
- "Make it right." See *Brennan v. Employers Liability Assurance Corp.* 365, 367.
- "Necessary use." See *Crosier v. Shack*, 253, 255, 256.
- "Owner." See *Union Trust Co. v. Reed*, 199, 200, 201.
- "Property." See *Delval v. Gagnon*, 203, 206.
- "Rights of way." See *Connecticut Valley Street Railway v. Northampton*, 54, 61, 62, 64, 65.
- "Unmarried." See *Russell v. Lilly*, 529, 530.
- "Votes." See *Cashman v. City Clerk of Salem*, 153, 157, 158.
- "Whole amount insured." See *Taber v. Continental Ins. Co.* 487, 490.

WRIT.

Indorser of.

See PRACTICE, CIVIL, *Indorser of Writ.*

WRIT OF REVIEW.

See REVIEW.

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